

EXHIBIT C

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CERTIFIED COPY

ELLIOT MCGUCKEN, an individual,)
)
Plaintiff,)
)
vs.) No.
) 1:19-cv-09617-KPF
NEWSWEEK LLC, a New York)
Limited Liability Company; and)
DOES 1-10, inclusive,)
)
Defendants.)
_____)

CONFIDENTIAL

VIDEOCONFERENCING 30(b)(6) DEPOSITION OF
NEWSWEEK DIGITAL LLC'S PERSON MOST QUALIFIED,
BY AND THROUGH, JAMES ETHERINGTON-SMITH
THURSDAY, MARCH 11, 2021

ATKINSON-BAKER, a Veritext Company
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REPORTED BY: MARYLYNNE SANDOVAL-ROBLES,
CSR NO. 12498

FILE NO.: AF01A27

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SOUTHERN DISTRICT OF NEW YORK

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NEWSWEEK LLC, a New York)
Limited Liability Company; and)
DOES 1-10, inclusive ,)
Defendants.)
_____)

CONFIDENTIAL VIDEOCONFERENCING 30(b)(6) DEPOSITION
OF JAMES ETHERINGTON-SMITH, taken on behalf of the
Plaintiff, commencing at 6:34 A.M., on Thursday,
March 11, 2021, pursuant to Notice, before MARYLYNNE
SANDOVAL-ROBLES, CSR No. 12498, a Certified Shorthand
Reporter, in and for the County of Los Angeles, State
of California.

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I N D E X

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QUESTIONS INSTRUCTED NOT TO ANSWER

None .

INFORMATION REQUESTED

None .

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CALIFORNIA, THURSDAY, MARCH 11, 2021

6:34 A.M.

JAMES ETHERINGTON-SMITH,
called as a witness by and on behalf
of the Plaintiff, being first duly
sworn, was examined and testified
as follows:

EXAMINATION

BY MR. BURROUGHS:

Q. Good morning. Can you state and spell your
name for the record?

A. Yes. James Etherington-Smith. That's
J-A-M-E-S, E-T-H-E-R-I-N-G-T-O-N, hyphen, Smith,
S-M-I-T-H.

Q. Great. Now, where do you currently reside?

A. In London, England.

Q. Okay. And are you currently employed?

A. Yes.

Q. Okay. What is your current occupation?

A. Currently managing editor at Newsweek London
Bureau.

Q. Okay. How long have you had that position?

A. Since October of 2020.

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1 Q. Okay. Before you had that position, were
2 you with Newsweek?

3 A. Yes.

4 Q. What was your title then?

5 A. Copy chief.

6 Q. Okay. How long did you hold that position?

7 A. From roughly March 2017, from my
8 recollection.

9 Q. Okay. And was that your first role at
10 Newsweek?

11 A. Yes.

12 Q. Okay. Prior to working at Newsweek, where
13 did you work?

14 A. I worked at International Business Times UK.

15 Q. What was your title there?

16 A. There I was chief subeditor.

17 Q. Okay. And how long did you work there?

18 A. From September 2014 until I joined Newsweek.

19 Q. Okay. Was that your first -- well, let me
20 ask you this.

21 Did you go to university?

22 A. I did.

23 Q. Where did you go to university?

24 A. In South Africa. University of
25 Johannesburg.

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1 Q. Okay. What did you study there?

2 A. Journalism. Bachelor of journalism.

3 Q. Okay. Was your first job after graduating
4 at IBT?

5 A. It was not.

6 Q. What was your first job after graduating?

7 A. First journalism job, specifically?

8 Q. (Indicating.)

9 A. Yeah. I worked at a website called
10 MyBroadband, which is a tech website.

11 Q. Was that also a UK company?

12 A. No. That was a South African company.

13 Q. Okay. Have you ever worked directly for a
14 company based in the United States?

15 A. Yeah. I believe Newsweek is based in the
16 United States, and I work for Newsweek.

17 Q. Okay. Is your employer the Newsweek US
18 entity or another entity?

19 A. I'm not entirely sure how they broke it
20 down, but I believe, yes, I work the Newsweek -- the
21 US entity. There may be, you know, some UK
22 subsidiary or something, but I'm not sure of the
23 details.

24 Q. When you receive a check or a wire transfer,
25 who is the sender?

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1 A. From my memory, it's something like Newsweek
2 Digital, LLC, or something like that.

3 Q. Okay. And have you ever had your deposition
4 taken before?

5 A. No. First one.

6 Q. Okay. Well, I'm going to go real briefly
7 over a couple of ground rules. You're doing
8 fantastic so far.

9 You know, the most important one, and this
10 is for the benefit of Ms. Sandoval, is, you know,
11 allow me to finish my questions before answering, and
12 make sure that you understand my question before
13 answering. And when you do answer, make sure to use,
14 you know, audible cues, such as yeses or nos as
15 opposed to head nods or uh-huhs or huh-uhs.

16 Does all that make sense?

17 A. Understood.

18 Q. Okay. And if you answer my question, I'm
19 going to assume that you understood it. So if any of
20 my questions are in any way unclear, please let me
21 know. Okay?

22 A. Understood.

23 Q. Okay. And at the end of these proceedings,
24 you're going to get a bound transcript of everything
25 that is said today, and you're going to be able to

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1 make changes to it.

2 But to the extent that you make changes to
3 it that are substantive, like a yes to a no or a red
4 to a blue, I can comment on that when this case goes
5 to trial, and that may impact your credibility in
6 front of the jury. So it's very important that you
7 only answer questions that you understand. Okay?

8 A. Yes. Understood.

9 Q. All right. Is there any reason why you
10 wouldn't be able to give your best testimony today?
11 Have you had any illnesses, any drugs or alcohol in
12 the last 24 hours, anything like that?

13 A. No reason.

14 Q. Okay. And you understand that you're here
15 today to testify -- you know, even though you are
16 you, a person, you're testifying on behalf of
17 Newsweek, the company?

18 A. Yes. I understand that.

19 Q. And that your answers bind Newsweek, the
20 company?

21 A. Yes.

22 Q. Okay. One final thing is, throughout the
23 proceedings, at times I may ask you to give me a best
24 estimate; dates, numbers, things like that. I want
25 you -- and I'm actually entitled to your best

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1 estimate, but I don't want you to guess in response
2 to my question.

3 For example, you know, if I ask you how many
4 articles have you written, you probably don't know
5 the exact number. Or maybe you do. But you could
6 estimate for me how many you've written based on your
7 experience.

8 If I ask you how many articles I've written,
9 you know, unless you're familiar with my work, and
10 I'm assuming you're not, it's mostly legal stuff,
11 it's pretty boring, you'd have to guess. You have no
12 personal knowledge of how many articles that I've
13 written. So that's an illustrative aid showing the
14 difference between a guess and an estimate.

15 Does that make sense?

16 A. It makes sense.

17 Q. Okay. Do you know why we're here today?

18 A. I believe so.

19 Q. Okay. What's your understanding of why
20 we're here today?

21 A. To sort of -- for you to gather information
22 on some of the processes that Newsweek undertakes in
23 the creation of its articles.

24 Q. Do you understand a photographer,
25 Dr. Elliot McGucken, has alleged that Newsweek

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1 displayed one of his photographs without his consent?

2 A. Yes.

3 Q. Okay. And is that a practice that Newsweek
4 does regularly? Are they regularly using photographs
5 on their website without the artist's consent?

6 A. No.

7 Q. Okay. Would you agree with the statement
8 that it wouldn't violate any Newsweek policy for
9 Newsweek to publish an artist's photograph without
10 their consent so long as they do it via a embed
11 process?

12 MS. GATES: Objection as to form.

13 BY MR. BURROUGHS:

14 Q. You should still answer.

15 A. Can you repeat the question, please?

16 Q. Sure. And let me provide another ground
17 rule. I believe I omitted that one.

18 Your attorney, Ms. Gates, may interpose
19 objections throughout the proceedings. Those are
20 just for the record. So allow her to make the
21 objection and the court reporter to write it down or
22 to type it out, but you should still answer the
23 questions. Okay?

24 A. Yes. Understood.

25 Q. All right. Now, would you agree with the

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1 statement that it doesn't violate any Newsweek
2 policy, and is in fact compliant with Newsweek's
3 policy, for Newsweek to publish photography from
4 artists without their consent so long as they publish
5 that photography via an embed process?

6 MS. GATES: Objection as to form.

7 THE WITNESS: I find sort of the structure
8 of the question a bit confusing. If you could maybe
9 rephrase it?

10 BY MR. BURROUGHS:

11 Q. Okay. Let me ask it this way.

12 In your mind, does it violate Newsweek
13 policy to publish photographers' work without their
14 consent so long as Newsweek publishes it via
15 Instagram's embed process?

16 MS. GATES: Objection as to form.

17 THE WITNESS: Sorry. Please repeat the
18 question.

19 BY MR. BURROUGHS:

20 Q. No problem. Yeah. I can repeat it for you
21 as many times as you want. I really --

22 (Speaking simultaneously.)

23 THE WITNESS: Yeah, yeah, no. I'm just
24 trying to figure out the structure of how you're
25 asking it so I can answer correctly.

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1 BY MR. BURROUGHS:

2 Q. Okay. Well, let me ask a few foundational
3 questions.

4 A. Yeah.

5 Q. Does Newsweek have a policy about using
6 third-party artists' work?

7 A. Yes.

8 Q. Okay. And is that policy enforced at
9 Newsweek?

10 A. Yes.

11 Q. And per that policy, can Newsweek publish
12 photography created by third-party artists without
13 their consent?

14 A. No. I mean, I guess it depends on what you
15 mean by "publish" in the context of why we're here.

16 Q. Okay. For that policy, can Newsweek
17 display, on its website, photography taken by
18 third-party artists without their consent?

19 A. We do not host content without consent in
20 one way or another.

21 Q. Do you display content without artist
22 consent?

23 MS. GATES: Objection as to form.

24 THE WITNESS: If by "display," you mean use
25 an embed, we will use an embed.

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1 BY MR. BURROUGHS:

2 Q. Okay. When you use an embed, is the
3 photograph displayed on Newsweek.com?

4 A. It's -- it is visible on Newsweek.com.

5 Q. Is it visible to readers of Newsweek.com?

6 A. Yes.

7 Q. Okay. So is it compliant with Newsweek
8 policy to use third-party artists' work without their
9 consent so long as it's used via the embed process?

10 MS. GATES: Objection as to form.

11 THE WITNESS: Yeah. Please repeat that one
12 more time.

13 BY MR. BURROUGHS:

14 Q. Sure. Is it compliant with Newsweek policy
15 to use third-party artwork without the artists'
16 consent so long as you use it via an embed process on
17 Newsweek.com?

18 MS. GATES: Objection as to form.

19 THE WITNESS: Yeah. I would say that there
20 is no sort of policy on that specifically in the
21 sense that using an embed has never been considered
22 -- and sorry. What was the last part of your
23 question? Without consent. Using an image -- an
24 embed without consent has never been considered a
25 potential copyright issue.

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1 BY MR. BURROUGHS:

2 Q. So in your mind, as of today, March 11th,
3 2021, Newsweek doesn't have a policy about using
4 content via embeds; is that accurate?

5 A. Nothing that sort of specifically addressed
6 using embeds and saying, do not use embeds without
7 consent.

8 Q. Are you aware of whether or not Facebook has
9 taken a position on whether publications like yours
10 can use photographers' work without their consent via
11 the embed process?

12 MS. GATES: Objection as to form.

13 THE WITNESS: I'm not aware.

14 BY MR. BURROUGHS:

15 Q. Would it surprise you to learn that Facebook
16 has publicly stated that publications like yours
17 cannot use photographers' content without consent
18 on --

19 MS. GATES: Objection --

20 (Speaking simultaneously.)

21 BY MR. BURROUGHS:

22 Q. -- websites like yours?

23 A. Well, I -- "use" is sort of a very loose
24 word there.

25 Q. Okay. Are you aware that Facebook has taken

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1 the position that websites like yours cannot display
2 photography from Instagram without the artist's
3 consent?

4 MS. GATES: Objection as to form.

5 THE WITNESS: I'm not aware that we are --
6 that Facebook has taken the stance that we cannot
7 embed anything from Facebook or Instagram.

8 BY MR. BURROUGHS:

9 Q. Are you aware of any public statements or
10 positions taken by Facebook relating to the use of
11 embedded content on websites like yours?

12 A. No.

13 Q. Have you ever done any due diligence or
14 researched the issue of whether Facebook allows sites
15 like yours to use photography from Instagram without
16 the artist's consent?

17 MS. GATES: Objection as to form.

18 THE WITNESS: I haven't.

19 BY MR. BURROUGHS:

20 Q. Are you aware of anyone at Newsweek having
21 any conversations about whether Facebook allows its
22 websites like yours to use content embedded from
23 Instagram without the artist's consent?

24 MS. GATES: Objection as to form and to the
25 extent this is getting into any privileged

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1 communications.

2 THE WITNESS: Can you repeat the question,
3 please?

4 BY MR. BURROUGHS:

5 Q. Sure. Has anyone at Newsweek had any
6 conversations that you're aware of relating to
7 whether or not websites like yours can use content
8 from Instagram without the artist's consent?

9 MS. GATES: Same objection.

10 THE WITNESS: About whether we've had
11 conversations that Facebook -- sorry. I'm -- repeat
12 that end part of the question again. So sorry.

13 BY MR. BURROUGHS:

14 Q. No problem. Are you aware of any
15 conversations at Newsweek regarding whether or not
16 Facebook allows websites like yours to use content
17 from Instagram without the artist's consent?

18 MS. GATES: Same objection.

19 THE WITNESS: I am not aware.

20 BY MR. BURROUGHS:

21 Q. So as you sit here today -- you the --
22 managing editor; is that correct?

23 A. Yes.

24 Q. You, the managing editor of Newsweek, have
25 no understanding as to Facebook's policy or position

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1 regarding the use of Instagram content without
2 consent on websites like yours; is that correct?

3 MS. GATES: Objection as to form.

4 THE WITNESS: I don't know the specific
5 details of Facebook or Instagram's policies on this
6 matter.

7 BY MR. BURROUGHS:

8 Q. Have you ever reviewed those policies?

9 A. I have not.

10 Q. Have you ever reviewed Instagram's terms?

11 A. I have not.

12 Q. Are you involved at all in reviewing
13 Instagram to look for material to copy for display on
14 your website?

15 MS. GATES: Objection as to form.

16 THE WITNESS: Can you sort of more clearly
17 define "review" in that question?

18 BY MR. BURROUGHS:

19 Q. Look at.

20 A. I have looked at Instagram.

21 Q. Have you ever gone on Instagram specifically
22 with the purpose to find photographs to copy for
23 display on your website?

24 MS. GATES: Objection as to form.

25 THE WITNESS: Sorry. So you said copy onto

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1 our website?

2 BY MR. BURROUGHS:

3 Q. (Indicating.)

4 A. I would say no.

5 Q. Okay. How about to display on your website
6 via an embed?

7 A. I'm -- can't recall a specific incident
8 where I've done that.

9 Q. Do you dispute that it's Newsweek's business
10 practice to regularly review Instagram to look for
11 content to reproduce and display on its website via
12 an embed?

13 MS. GATES: Objection as to form.

14 THE WITNESS: I wouldn't say -- I mean, it
15 is something we do, is embed stuff from Instagram,
16 yeah.

17 BY MR. BURROUGHS:

18 Q. Over the past year, can you estimate for me
19 how many times you've done that?

20 A. I don't think I'd be able to give an
21 accurate estimate.

22 Q. More than ten?

23 A. Probably more than ten.

24 Q. More than 50?

25 A. Possibly more than 50.

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1 Q. More than a hundred?

2 A. Yeah, probably.

3 Q. Okay. More than 200?

4 A. I mean, yes, probably more than 200. But
5 we're getting into this area of, you know, I don't
6 know what's in every single article on Newsweek. So
7 I can estimate, but yeah.

8 Q. Okay. So is it fair to say that your best
9 estimate is, over the past year, Newsweek has
10 displayed on its website content from Instagram at
11 least 200 times via embed; is that correct?

12 MS. GATES: Objection to form. Speculation.

13 THE WITNESS: Yeah. I mean, I don't want to
14 estimate because I really just don't know.

15 BY MR. BURROUGHS:

16 Q. Well, again, I am entitled to your best
17 estimate. If you're telling me you have no
18 understanding or no estimate as to how many times
19 that's happened, that's fine.

20 But I believe you testified that your best
21 estimate was that it happened at least 200 times;
22 correct?

23 A. It could have happened 200 times.

24 Q. Okay. And what's that estimate based on?

25 A. Well, you said 200, so --

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1 Q. Well, I -- do you recall --

2 (Speaking simultaneously.)

3 THE WITNESS: Pardon me?

4 BY MR. BURROUGHS:

5 Q. Didn't you say 200?

6 A. Well, I also said 200. But you -- you were
7 sort of going up through the numbers, and, you know,
8 I don't know where to stop. So let's stop at 200.

9 Q. Okay. Well, just as a ground rule, you
10 should stop based on your personal knowledge and your
11 best estimate. Okay? I don't want you to guess.
12 I -- but I am entitled to your best estimate. Okay?

13 A. Yeah. So like I say, I really don't know.
14 So if we're just going to estimate, let's say more
15 than ten.

16 Q. Okay. And is that your best estimate?

17 A. Can you define "best"?

18 Q. The best based on your personal knowledge
19 and recollection. Okay?

20 Earlier you told me it was at least 200; now
21 you're telling me it's at least ten. I just want to
22 know which one is true.

23 A. Well, yeah, I mean, we've embedded many an
24 image from Instagram. To give you a specific
25 estimate would be quite difficult. So if I'm going

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1 to err on the side of caution, I will estimate a low
2 number.

3 Q. Okay.

4 A. But --

5 (Speaking simultaneously.)

6 BY MR. BURROUGHS:

7 Q. When was the last time --

8 A. Yeah. Sorry. Please carry on.

9 Q. When was the last time Newsweek embedded an
10 Instagram image in one of its articles?

11 A. I couldn't tell you specifically.

12 Q. Do you recall it happening in the last six
13 months?

14 A. I'm just racking my brains here. I would
15 think it has happened in the last six months.
16 Although I can't recall, you know, the last time
17 specifically we did an Instagram embed.

18 Q. Can you recall specifically if you used an
19 embed in the last year?

20 A. Specifically, no. But I am sure we have
21 used an embed on Instagram in the last year.

22 Q. Okay. And why are you sure?

23 A. Based on just, you know, the nature of the
24 -- what we do every day and the kind of articles we
25 write, there is more than likely an Instagram embed

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1 in one of those articles.

2 Q. Okay. Can you provide me your best estimate
3 as to the percentage of the images displayed on
4 Newsweek.com that come from Instagram via embed as
5 opposed to your Getty images account?

6 MS. GATES: Objection as to form.
7 Speculation.

8 THE WITNESS: I couldn't give a sort of
9 percentage on that.

10 BY MR. BURROUGHS:

11 Q. Okay. So you couldn't tell me whether or
12 not it was 50/50, for example?

13 A. I couldn't tell that you.

14 Q. Okay. So as you sit here today, you're
15 unaware of how many of the photographs displayed on
16 Newsweek came from Instagram as opposed to Getty;
17 correct?

18 MS. GATES: Objection as to form.

19 THE WITNESS: Yes. I'm unaware of exactly
20 how many Instagram embeds we have on all of our
21 articles on Newsweek.

22 BY MR. BURROUGHS:

23 Q. Can you provide me with your best estimate
24 as to the percentage?

25 A. I don't -- I don't think I can, to be

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1 honest. That's -- you know, there's a lot of have
2 variables involved. So if I was -- I would be
3 guessing to just pick a percentage.

4 Q. Okay. That's fair. So it's accurate to say
5 that, as you sit here today, you're unaware of the
6 percentage of Instagram photos used on Newsweek as
7 opposed to Getty photos; correct?

8 MS. GATES: Objection as to form.

9 THE WITNESS: Sorry. Can you just repeat
10 that, please.

11 BY MR. BURROUGHS:

12 Q. Sure. As you sit here today, you're unaware
13 to give me an estimate as to the percentage of
14 photographs displayed on Newsweek that came from
15 Instagram as opposed to Newsweek -- I'm sorry -- as
16 opposed to Getty; correct?

17 MS. GATES: Same objection.

18 THE WITNESS: Yes. It would be difficult
19 for me to give a percentage that was an estimate and
20 not a guess.

21 BY MR. BURROUGHS:

22 Q. Okay. And it's so difficult, in fact,
23 you're unable to do that; correct?

24 A. Sorry. Pardon me?

25 Q. It's so difficult you're unable to do it;

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1 correct?

2 A. Yes. It would -- if I gave you a
3 percentage, it would be a guess and not even an
4 estimate because of, as I mentioned, lots of
5 variables, and I'm not, you know, able to look at
6 every single article ever that has been published on
7 Newsweek.

8 Q. Okay. So for the photographs that you've
9 displayed on your website via the embed from
10 Instagram, in how many of those cases do you recall
11 reaching out to the artist and requesting permission
12 in connection with their work?

13 MS. GATES: Objection as to form.

14 THE WITNESS: So it -- in my recollection of
15 doing that, I don't reach out to artists to request
16 permission.

17 BY MR. BURROUGHS:

18 Q. Okay. So as you sit here today, Newsweek
19 can't recall any instances in which it reached out to
20 the artist for using and displaying the artist's work
21 on Newsweek via the embed process; correct?

22 MS. GATES: Objection as to form.

23 THE WITNESS: I believe our reporters often
24 contact artists to request permission to host the
25 image on our site. But not for permission to use the

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1 embed feature.

2 BY MR. BURROUGHS:

3 Q. Understood. You have no personal knowledge
4 of so doing; correct?

5 A. No personal knowledge of what? Sorry?

6 Q. Of reaching out to the artists?

7 A. I personally have never, to my recollection,
8 contacted an artist to request permission to host
9 their image on our website.

10 Q. Okay. Have you ever contacted an artist for
11 any purpose in connection with their work and your
12 website?

13 A. To my memory, I've never personally
14 contacted an artist.

15 Q. Okay. And you're not personally aware of
16 anyone else at Newsweek doing that; correct?

17 A. I am aware that our reporters will contact
18 artists about images.

19 Q. When was the last time you recollect that
20 happening?

21 A. I couldn't give a very specific answer
22 there. It presumably happens all the time.

23 Q. Okay. So as you sit here today, you can't
24 recollect Newsweek ever reaching out to an artist in
25 connection with using or displaying work that the

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1 artist has posted to Instagram; correct?

2 MS. GATES: Objection as to form.

3 Mischaracterization.

4 THE WITNESS: Sorry. Could you repeat the
5 question?

6 BY MR. BURROUGHS:

7 Q. Sure. Well, I believe you just testified
8 you don't remember specifically anybody from Newsweek
9 ever reaching out to an artist that has posted work
10 on Instagram about Newsweek potentially displaying
11 their work; is that correct?

12 MS. GATES: Objection.

13 THE WITNESS: Sorry. Well, yeah, I mean
14 obviously we're here today specifically for this
15 example. So I -- I don't remember the event in which
16 our reporter contacted the artist. You know, I
17 don't -- I don't sort of micromanage that aspect of
18 what they do.

19 So to give you sort of specific, you know,
20 times that a reporter contacted an artist about an
21 image, I wouldn't be able to do that.

22 BY MR. BURROUGHS:

23 Q. Okay. Are you aware of anyone at Newsweek
24 ever contacting an artist on Instagram and giving
25 them notice that Newsweek planned to display their

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1 Instagram work via an embed?

2 MS. GATES: Objection as to form.

3 THE WITNESS: Sorry. Please repeat the
4 question again.

5 BY MR. BURROUGHS:

6 Q. Are you aware of anyone at Newsweek ever
7 reaching out to the artist and giving them notice
8 that Newsweek intends to use their work from
9 Instagram on Newsweek.com?

10 A. Can you define "notice"?

11 Q. Let them know. Advise them.

12 A. I mean, it depends on the -- it depends on
13 the sense of that term. We -- I am aware that our
14 reporters contact artists to request permission to
15 host the image on our website. Otherwise we will
16 embed the image if they do not give us that
17 permission to host the image on our website.

18 Q. So it's your understanding that Newsweek's
19 practice is when an artist declines to give consent
20 to Newsweek to host the image, Newsweek will instead
21 embed the image and display it via the link; correct?

22 MS. GATES: Objection as to form.

23 THE WITNESS: If an artist, you know, tells
24 us we do not have permission to host an image on our
25 website, then we will not host the image on our

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1 website.

2 And I'm not aware of any case where we have
3 also, having been told by an artist do not host our
4 image, that we then went ahead and also embedded it
5 after that fact.

6 BY MR. BURROUGHS:

7 Q. In situations where you asked for consent
8 but the artist doesn't respond, will you still go
9 ahead and display their content on your site?

10 MS. GATES: Objection as to form.

11 THE WITNESS: If you've asked for consent to
12 host the image and they haven't responded, we will
13 probably embed the image.

14 BY MR. BURROUGHS:

15 Q. Okay. And that's your policy even today;
16 correct?

17 A. Our policy is to request permission to host
18 the image.

19 Q. Okay. And if you're not given that
20 permission?

21 A. Then we won't host the image.

22 Q. Will you also -- will you at that point
23 embed the image?

24 A. We may embed the image if we haven't heard
25 back from the artist.

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1 Q. And that's your process even today at
2 Newsweek; correct?

3 A. Yes. We -- yeah, we do that.

4 Q. Is there anyone at Newsweek, and perhaps
5 it's you, that reviews articles before they're posted
6 to Newsweek.com to ensure that they're compliant with
7 artists' rights?

8 A. Yes. We review articles before they're
9 posted.

10 Q. And whose job is that?

11 A. It is my job as well as some other editors
12 in the business.

13 Q. Okay. And what's the process for reviewing
14 that content to ensure that it doesn't infringe the
15 copyrights of any third parties?

16 MS. GATES: Objection as to form.

17 THE WITNESS: So we will take a look at the
18 article that the reporter has submitted. Pardon me.
19 And we will, you know, in the process of looking at
20 that article, look at the images that are uploaded
21 into our system.

22 And, you know, if anything strikes us as,
23 you know, potentially an issue for whatever reason,
24 we will just then dig into the details of that and
25 review it with the reporter to ensure that we do have

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1 permission to use the image that's posted.

2 BY MR. BURROUGHS:

3 Q. Okay. So the images are uploaded to your
4 server for review by the editors before they go live
5 on Newsweek.com; is that accurate to say?

6 MS. GATES: Objection as to form.

7 THE WITNESS: Yeah. When we upload an image
8 onto our server, it'll be part of the article that
9 the reporter submits, and the editors review those
10 articles before they go live.

11 BY MR. BURROUGHS:

12 Q. When you're reviewing an article that uses
13 an embed, is a reproduction of that particular
14 photograph in your system, or how is that reviewed?

15 MS. GATES: Objection as to form. Compound.

16 THE WITNESS: So yeah, embeds are simply
17 kind of like a window into what is posted on
18 Instagram or another server. So those, you know, we
19 don't review them with any concerns for copyright
20 issues.

21 BY MR. BURROUGHS:

22 Q. So what do you mean by that?

23 A. I mean that, you know, embeds are -- you
24 know, by the nature of them, they -- they don't seem
25 to be, you know, a copyright issue because we are not

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1 posting that content on our site. It is posted
2 externally. And all we've done is, you know,
3 embedded the window into viewing that content
4 externally.

5 Q. Okay. So it's your understanding as the
6 managing editor that displaying a third party's
7 content on your site is not a copyright infringement;
8 correct?

9 MS. GATES: Objection as to form.

10 THE WITNESS: Sorry. Please repeat that.

11 BY MR. BURROUGHS:

12 Q. Sure. Let -- I -- let me ask you this way.
13 Is displaying an artist's work on your
14 website without their consent copyright infringement?

15 MS. GATES: Objection as to form and to the
16 extent we're getting into legal conclusions.

17 THE WITNESS: So we will display images --
18 well, we embed images. That's not a copyright
19 concern as far as we are concerned. And if we're
20 hosting an image, we will have obtained rights or
21 permission to use that image.

22 BY MR. BURROUGHS:

23 Q. Okay. So when I go to Newsweek.com, the
24 embedded images are visible to me, right, I can see
25 them?

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1 A. You should be able to, yes.

2 Q. So is it fair to say they're being displayed
3 to me as the viewer?

4 MS. GATES: Objection as to form.

5 THE WITNESS: Well, they are visible to you,
6 yes.

7 BY MR. BURROUGHS:

8 Q. And it's your understanding that Newsweek
9 making that image visible to me is not copyright
10 infringement; correct?

11 MS. GATES: Objection as to form.

12 THE WITNESS: So we don't -- we don't think
13 that embedding an image is -- from an external site
14 is copyright infringement presumably because the
15 person who uploaded that image intended for it to be
16 shared in this way because those, you know, systems
17 are, you know, widely known to be available to use
18 for that purpose.

19 BY MR. BURROUGHS:

20 Q. And I understand your position on embedding.
21 My question is you're making it visible to me. You
22 testified that Newsweek will make visible to me the
23 embedded photograph, and I'm asking you do you
24 believe that is infringement of the artist's
25 copyright?

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1 MS. GATES: Objection. This is getting into
2 legal territory.

3 THE WITNESS: I -- I don't think that the
4 embedded image that is visible to you is a copyright
5 infringement.

6 BY MR. BURROUGHS:

7 Q. And you also testified that it's your
8 understanding that artists, in putting work on
9 Instagram, intend for companies like yours to display
10 it on their website; is that accurate?

11 MS. GATES: Objection as to form.

12 THE WITNESS: Well, I can't speak on behalf
13 of all the artists, but if, you know, an artist uses
14 a platform like Instagram, which is designed to share
15 images widely and they provide all the tools to embed
16 them and so on, one could assume that the artist knew
17 this might happen with their image. It might be
18 embedded somewhere and visible, you know, outside of
19 directly on Instagram.com. That is the very nature
20 of Instagram and social media.

21 BY MR. BURROUGHS:

22 Q. Okay. So is it fair to say that, you know,
23 your testimony regarding the artist's intent is based
24 on your assumption or assumptions regarding the
25 Instagram platform?

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1 MS. GATES: Objection as to form.

2 THE WITNESS: Well, could you maybe repeat
3 the question, please?

4 BY MR. BURROUGHS:

5 Q. Sure. Well -- and I don't want to put words
6 in your mouth. But I believe you testified that you
7 assume, if an artist puts something on Instagram,
8 they're aware that companies like yours are going to
9 display it on your website without their consent; is
10 that accurate and fair?

11 MS. GATES: Objection. Same objection.

12 THE WITNESS: It seems like common sense
13 that if an artist posts their image to a site like
14 Instagram, which is intended for sharing and
15 embedding and provides all the tools for people to do
16 that, that they could expect that it might happen.

17 BY MR. BURROUGHS:

18 Q. Have you ever read any -- anything, seen
19 anything, or talked to any artists who have actually
20 expressed that view to you?

21 MS. GATES: Objection as to form.

22 THE WITNESS: Not to my recollection.

23 BY MR. BURROUGHS:

24 Q. Okay. Would it surprise you to learn that
25 most artists do not share your view?

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1 MS. GATES: Objection as to form.

2 THE WITNESS: I don't really have an opinion
3 on if that's their view.

4 BY MR. BURROUGHS:

5 Q. But your view or the view of Newsweek is
6 that Newsweek can use on its website, so long as it
7 embeds the photograph, any photograph on Instagram
8 because Newsweek believes the -- that artists, when
9 posting to Instagram, understand that at least it's
10 going to be reproduced and displayed on other
11 websites; is that accurate?

12 MS. GATES: Objection as to form.

13 THE WITNESS: Yes. Could you repeat that
14 one more time? It's quite a complicated question.

15 BY MR. BURROUGHS:

16 Q. Sure. Let me -- let me try to break it
17 down.

18 A. Yeah.

19 Q. And I don't want to put any words in your
20 mouth, so let me try to rephrase it objectively.

21 But I believe Newsweek's position is that
22 artists who publish work on Instagram do so with some
23 sort of knowledge that websites like Newsweek are
24 eventually going to use their work as displayed on
25 their websites via embed.

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1 MS. GATES: Objection as to form.

2 BY MR. BURROUGHS:

3 Q. Is that accurate?

4 A. So the -- I don't know what Newsweek's
5 position is on what the artists think.

6 But if the artist has posted an image to a
7 website that allows embedding, and then an image gets
8 embedded, I don't know why that would be a surprise.

9 Q. Okay. And is your belief based on anything
10 other than the fact that they put the work on a
11 social media platform?

12 MS. GATES: Objection as to form.

13 THE WITNESS: My belief that -- that what
14 specifically? Sorry.

15 BY MR. BURROUGHS:

16 Q. That Newsweek is free to display that work
17 on its website, and that the artists, you know,
18 wouldn't have any objection to that.

19 MS. GATES: Objection as to form. Compound.

20 THE WITNESS: It's my belief that if the
21 image is shared on social media and the tool is
22 provided to embed that image, then, you know, we will
23 do that.

24 BY MR. BURROUGHS:

25 Q. And when you say "we," that's the position

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1 of Newsweek; correct? That's not your personal
2 opinion.

3 A. I suppose as a representative of Newsweek
4 and the fact that we do embed images and articles,
5 yes.

6 Q. Have you ever had an artist reach out to
7 Newsweek and object after Newsweek displayed one of
8 their works without consent?

9 MS. GATES: Objection as to form.

10 THE WITNESS: Not to my recollection.

11 BY MR. BURROUGHS:

12 Q. Has Newsweek ever been in contact with
13 Facebook or Instagram about whether or not Newsweek's
14 use of user content is authorized?

15 MS. GATES: Objection as to form.

16 THE WITNESS: That I don't know.

17 BY MR. BURROUGHS:

18 Q. Has Newsweek -- I'm sorry. Withdraw the
19 question.

20 Has Facebook or Instagram ever affirmatively
21 authorized Newsweek to display content from Instagram
22 via the embed process?

23 MS. GATES: Objection as to form.

24 THE WITNESS: That I do not know.

25 ///

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1 BY MR. BURROUGHS:

2 Q. Okay. Are you aware of any communications
3 between Newsweek and Facebook or Instagram?

4 A. I am not.

5 Q. What are your day-to-day responsibilities at
6 Newsweek?

7 A. So I sort of oversee the production of the
8 articles. I may edit some of them myself. I may
9 offer guidance and advice to the reporters and
10 editors. And, you know, other mundane administrative
11 tasks as well. I mean, we can go into boring details
12 if you like.

13 Q. Is your focus on prose -- on text or on
14 photography, or do you cover both?

15 A. So we -- I would say probably mainly on the
16 text. But the images are a part of the article that
17 gets published, so we do see the images and consider
18 them in the context of the article as well.

19 Q. Okay. What is your process, if any, in
20 terms of reviewing the photography or the visual
21 assets incorporated in your article?

22 A. So if an image is, you know, hosted on our
23 site, we will generally have trained the reporters in
24 the -- you know, the policies on how to do this
25 properly. Pardon me.

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1 And we will -- you know, the editor will,
2 during the course of reviewing the article, have a
3 look at the image. You know, is it appropriate to
4 the context of the story and is it labeled correctly
5 and has it been credited correctly to the artist or
6 image licensing company.

7 And, you know, if any red flag comes up that
8 the image is not from one of our providers or we just
9 want to double-check with the reporter, we will do
10 that to make sure they got it from one of our
11 providers. And then when we're happy, we will go
12 live with the article.

13 Q. And if you're reviewing an article, and you
14 see a photograph that's being displayed in the
15 article as part of an embed process, you'll approve
16 that because you understand an embedded display not
17 to be copyright infringement; correct?

18 MS. GATES: Objection as to form.

19 THE WITNESS: So an embedded image, as I
20 said, is not hosted on our site. So we don't
21 consider it, you know, in the copyright sense, so we
22 will go ahead and embed the image.

23 BY MR. BURROUGHS:

24 Q. Okay. So is it fair to say that once you
25 confirm that it is embed, there's no need to do

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1 further copyright inquiry or investigate whether or
2 not it's violated in any way; correct?

3 MS. GATES: Objection as to form.

4 THE WITNESS: I'm sorry. Could you repeat
5 the question? You just trailed off at the end there.
6 BY MR. BURROUGHS:

7 Q. Sure. So I believe you testified that once
8 you confirm it's an embed and it's not hosted on your
9 site, it's your position that there are no further
10 copyright concerns with Newsweek using the
11 photograph; correct?

12 MS. GATES: Objection as to form.

13 THE WITNESS: Yes. Generally speaking,
14 embeds are, you know, not posted on our servers. So
15 we don't think we, you know, have a concern about the
16 copyright of that image because it's external. It's
17 not something we, you know, added to our site.

18 BY MR. BURROUGHS:

19 Q. Okay. So at that point, you wouldn't reach
20 out to the creator of that photograph to seek a
21 license; right?

22 MS. GATES: Objection as to form.

23 THE WITNESS: So in general terms, the
24 reporter may contact the creator of that image or
25 person who uploaded that photograph, or whatever it

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1 is, and ask permission to host a copy of that image
2 directly on our servers. But if we, you know, don't
3 hear back, we'll probably continue with the embedded
4 version of that photograph or whatever it is.

5 BY MR. BURROUGHS:

6 Q. Okay. Aside from that, would you do
7 anything else to ensure that Newsweek's display of
8 the photograph didn't violate anyone's rights?

9 MS. GATES: Objection as to form.

10 THE WITNESS: Not -- I can't think of
11 anything we would do beyond that.

12 BY MR. BURROUGHS:

13 Q. Okay. So at that point you would approve
14 the article, and it would be published at
15 Newsweek.com; correct?

16 A. Yeah. As long as the image isn't offensive
17 to us in some way, yes.

18 Q. Okay. How many writers do you have working
19 under you now?

20 A. On any given day, I think we have roughly 15
21 to 20 -- 15 to 18 writers working. It can vary for
22 various reasons.

23 Q. And do you have any photographers working
24 under you currently?

25 A. I'm not aware of any photographers that have

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1 been hired.

2 Q. During your tenure at Newsweek, are you
3 aware of any photographers ever being hired?

4 A. I'm not aware of a specific case of a
5 photographer being hired.

6 Q. So as far as you know, Newsweek's practice
7 is to source its photography from Getty or social
8 media; right?

9 MS. GATES: Objection as to form.

10 THE WITNESS: We will, you know, upload
11 images to our server from our licensed providers or
12 any other source where if Getty -- you know, a
13 copyright isn't released or is no longer obtainable.
14 And that's, you know, how we go about handling images
15 on our server.

16 BY MR. BURROUGHS:

17 Q. Okay. Are you aware of Newsweek ever paying
18 a photographer a license fee to use their photo?

19 A. Well, I suppose sort of indirectly through
20 our agreements with Getty and iStock and so on.

21 Q. Okay. So aside from Getty, it's accurate to
22 say that Newsweek's practice is not to pay a license
23 fee for the use of photographs; right?

24 MS. GATES: Objection as to form.

25 THE WITNESS: I'm not aware of instances

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1 outside of Getty where we've paid a license fee, but
2 I wouldn't say it's our practice to not pay license
3 fees.

4 BY MR. BURROUGHS:

5 Q. How many articles do you review a day on a
6 typical day?

7 A. It can vary. You know, it can be somewhere
8 between 10 and 20, depending.

9 Q. And how many articles go live on
10 Newsweek.com on a typical day?

11 A. I would estimate it's about -- somewhere
12 between 100 to 200.

13 Q. And that's every day; correct?

14 A. Yes. Every day.

15 Q. Well, what's your best estimate as to the
16 average time it takes one of your writers to put
17 together one of these articles?

18 A. I would estimate they take about two hours
19 to write some of the standard sized articles. Yeah.

20 Q. So are some of your writers filing multiple
21 stories per day?

22 A. Yes. They will generally file three to four
23 stories a day.

24 Q. What is the highest number of stories you've
25 ever seen filed by one writer in one day at Newsweek?

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1 MS. GATES: Objection. This is outside the
2 scope of the deposition topics.

3 BY MR. BURROUGHS:

4 Q. Go ahead.

5 A. I mean, maybe six per writer on a busy day.

6 Q. And how long does it take you on average --
7 a standard sized piece, to edit the piece?

8 A. I'll spend maybe 20 minutes to 30 minutes
9 editing the story.

10 Q. And is it fair to say that it would take
11 much longer to put these pieces together if you had
12 to get in touch with the photographer for the -- a
13 visual element in a piece to obtain a license?

14 MS. GATES: Objection as to form.

15 THE WITNESS: I don't know that it would
16 take longer. It's part of the two hours that I
17 mentioned that the reporter will contact anyone that
18 they want for comments or whatever as part of the
19 article.

20 BY MR. BURROUGHS:

21 Q. Okay. And then what are your writers paid
22 per article?

23 A. Oh --

24 MS. GATES: Objection. Getting outside the
25 scope again.

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1 BY MR. BURROUGHS:

2 Q. Go ahead.

3 A. A day -- I -- they don't get paid per
4 article. They --

5 Q. Per word?

6 A. No. They are paid just a salary for working
7 months.

8 Q. And is their compensation tied in any way to
9 the number of articles that they file?

10 A. Beyond sort of -- no. It's not tied to the
11 number they produce.

12 Q. Okay. Do you as editor encourage your
13 writers to file as many pieces as possible?

14 MS. GATES: Objection as to form.

15 THE WITNESS: No. We -- you know, we don't
16 want to overburden them with unreasonable demands in
17 that respect.

18 BY MR. BURROUGHS:

19 Q. Okay. Are you personally aware of any
20 differences in copyright law and the use of other
21 people's content between the UK and the US?

22 MS. GATES: Objection as to form.

23 THE WITNESS: No. I'm not an expert on
24 those matters.

25 ///

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1 BY MR. BURROUGHS:

2 Q. So as far as you know, for your purposes as
3 a journalist, the copyright laws in the UK and the US
4 are -- they're the same?

5 MS. GATES: Objection as to form.

6 THE WITNESS: I would assume there's many
7 subtle detailed differences, but I don't know what
8 they -- those are.

9 BY MR. BURROUGHS:

10 Q. And you don't take any (audio issue) account
11 in your day-to-day job duties; right?

12 MS. GATES: Objection as to form.

13 THE WITNESS: Sorry. Could you repeat it?
14 You just broke up a little bit there.

15 BY MR. BURROUGHS:

16 Q. Sure. You're not aware of any of these
17 distinctions, and they certainly don't impact the way
18 you do your job; correct?

19 MS. GATES: Same objection.

20 THE WITNESS: No. Beyond the general sort
21 of vigilance for not hosting on our sites anything we
22 don't have a license to use.

23 BY MR. BURROUGHS:

24 Q. Okay. Are you aware of any steps other than
25 what you've mentioned that Newsweek takes to ensure

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1 that it's not violating the copyrights of third-party
2 artists?

3 MS. GATES: Object --

4 THE WITNESS: Sorry. Can you repeat that
5 again?

6 BY MR. BURROUGHS:

7 Q. Sure. Are you aware of any steps that
8 Newsweek takes, other than what you've already
9 mentioned, to ensure that it's not violating the
10 rights of third-party artists?

11 MS. GATES: Objection as to form.

12 THE WITNESS: I'm not aware of any
13 additional steps that might be taken.

14 BY MR. BURROUGHS:

15 Q. Okay. Does Newsweek have any formal
16 copyright policy, for example?

17 A. So we have a policy on images, which is sort
18 of shared widely and it's used to train reporters
19 with.

20 Q. Okay. Is that the social media guidelines
21 drafted by Ms. Rice?

22 A. It could be. If you showed me the document,
23 I'd confirm.

24 Q. Aside from that, are you aware of any other
25 formal copyright policies at Newsweek?

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1 A. Beyond the sort of general image copyright
2 issues and general best practice in journalism to not
3 copy other people's work and, you know, try and pass
4 it off as your own without proper citation or
5 reference or anything, I'm not aware of any
6 additional policies.

7 Q. Okay. Have you ever attended any
8 conferences or sessions at Newsweek regarding
9 intellectual property?

10 A. I -- not to my recollection.

11 Q. Have you ever had -- withdraw the question.

12 Prior to your deposition today, did you have
13 conversations or communications with anyone regarding
14 this case?

15 MS. GATES: Objection to the extent we're
16 getting into privileged communications.

17 BY MR. BURROUGHS:

18 Q. Aside from with your attorneys.

19 A. No other conversations aside from the
20 attorneys.

21 Q. Okay. Have you ever had a conversation with
22 Ms. Rice regarding this case?

23 A. Not with her, but she was present in
24 discussions with the attorneys.

25 Q. Before those conversations, when was the

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1 last time you communicated with Ms. Rice?

2 A. It's -- I couldn't tell you specifically.
3 I'd have to check my records. Yeah.

4 Q. Okay. But as you sit here today, you don't
5 recall, other than the call with the attorneys, the
6 last time you communicated with Ms. Rice; correct?

7 A. Not specifically, no.

8 Q. Do you recall anything generally?

9 A. In general -- just trying to rack my brains
10 here. No, I mean, I can't -- I can't really think of
11 anything that I would have brought up with her.

12 Q. Okay. Have you discussed this case with
13 Yuliya?

14 A. I have not discussed it with her.

15 Q. Have you discussed this case with
16 Ms. Hignett?

17 A. I have not discussed it with her.

18 Q. Do you understand that the article at issue
19 in this case was drafted by or created by
20 Katherine Hignett?

21 A. Yes.

22 Q. Do you know Ms. Hignett?

23 A. Yes.

24 Q. Okay. When was the last time you
25 communicated with Ms. Hignett?

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1 A. I couldn't tell you specifically. Quite
2 some time ago.

3 Q. Does she still work with Newsweek?

4 A. She no longer works with Newsweek.

5 Q. And she hasn't worked with Newsweek since
6 2019; correct?

7 A. I couldn't tell you specifically off the top
8 of my head, but that sounds about right.

9 Q. Have you talked to her since 2019?

10 A. It's possible she was, you know, at the pub
11 one night or something like that.

12 Q. Do you recall having any communications with
13 her since 2019?

14 A. Nothing specifically. My -- you know, my
15 last communication could very well have been her
16 farewell party.

17 Q. Okay. Did you ever communicate with
18 Ms. Hignett about the McGucken article we're
19 discussing today?

20 A. No.

21 Q. Okay. Are you part of the Newsweek Slack
22 program?

23 A. We do use Slack for our internal
24 communication.

25 Q. Do you use that to communicate with your

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1 writers?

2 A. Yes.

3 Q. Have you ever discussed this dispute on
4 Slack?

5 A. No.

6 Q. Do your writers upload photographs to Slack
7 from time to time?

8 A. The writers may -- I mean, I couldn't say
9 what goes on entirely on Slack. You know, I don't --
10 I don't see everything that goes on. So I don't know
11 what they've uploaded on Slack.

12 Q. Have you ever seen a photograph uploaded to
13 Slack by one of your writers?

14 A. Not that I can specifically recall.

15 Q. Do you have any recollection of your writers
16 uploading photographs to Slack?

17 A. Not that I can specifically recall.

18 Q. If Ms. Hignett was no longer with Newsweek,
19 Newsweek wouldn't be holding her out to the public as
20 a Newsweek staff writer; correct?

21 MS. GATES: Objection as to form.

22 THE WITNESS: I'm not sure I understand the
23 question.

24 BY MR. BURROUGHS:

25 Q. Okay. Well, is Newsweek still representing

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1 to the public that Ms. Hignett writes for Newsweek?

2 MS. GATES: Objection as to form. And I
3 think we're getting outside the scope here.

4 THE WITNESS: I'm not aware if they are, but
5 as she no longer works with Newsweek, I don't suppose
6 they are.

7 BY MR. BURROUGHS:

8 Q. And does Newsweek have any policy about
9 keeping current its representations to the public
10 about which individuals are writing for or
11 representing the publication?

12 MS. GATES: Objection as to form.

13 THE WITNESS: I'm not aware of any policy on
14 that.

15 BY MR. BURROUGHS:

16 Q. All right. Ms. Zaharia is going to show you
17 an exhibit that was previously marked Exhibit 2, the
18 policy, it appears, of Newsweek relating to certain
19 intellectual properties. Newsweek 1 to 2.

20 (Plaintiff's Exhibit 2 was previously
21 marked by the court reporter for
22 identification and
23 is attached hereto.)

24 BY MR. BURROUGHS:

25 Q. And just take a moment and tell me if you've

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1 ever seen this before.

2 A. Yes. This document looks familiar.

3 Q. Okay. When was the first time you recall
4 seeing this document?

5 A. I don't know specifically when I first saw
6 it. Quite poor -- no. I couldn't give you a
7 specific answer on that.

8 Q. Would it have been recently?

9 A. No. I've been aware of this document for
10 quite some time.

11 Q. Did you have any input into the creation of
12 this document?

13 A. I did not.

14 Q. Have you ever had the occasion to enforce
15 any of the terms of this document?

16 A. Yeah. If by "enforce" you mean just sort of
17 training reporters and ensuring that they are, you
18 know, following the guidelines, then yes.

19 Q. Have you ever reprimanded or penalized any
20 of your team for violating these guidelines?

21 A. I don't recall a disciplinary sort of action
22 relating to violation.

23 Q. Are you aware of anyone at Newsweek ever
24 being reprimanded for violation of these guidelines?

25 MS. GATES: Objection as to form.

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1 THE WITNESS: I'm not aware of any sort of
2 formal reprimand that anyone had.

3 BY MR. BURROUGHS:

4 Q. Okay. Do you know who created this
5 document?

6 A. I believe it was Diane Rice.

7 Q. Okay. And how do you know that?

8 A. She was the one who distributed and -- yeah.
9 She distributed it to everyone via e-mail.

10 Q. Okay. So you recall receiving this document
11 from Ms. Rice via e-mail?

12 A. Yes. I received it at some point from her.

13 Q. Okay. And have you taken any steps in
14 connection with your oversight of your writers
15 ensuring that they follow these guidelines?

16 A. Steps -- yeah. Well, I mean, steps would be
17 to just ensure that they are indeed following these
18 guidelines.

19 Q. Okay. Do you recall having any
20 conversations with any of your writers relating to
21 these guidelines?

22 A. Yes. We may discuss certain images that
23 we're interested in using and whether or not we can
24 use them as it pertains to the guidelines.

25 Q. And who did you have that conversation with?

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1 A. I probably had it with most of the
2 reporters. Although I couldn't tell you -- give you
3 a list specifically of who I've spoken to about it.

4 Q. Can you name any writers with whom you had a
5 conversation regarding these guidelines?

6 A. Well, yes. Generally speaking, we -- when I
7 train new writers, for example, this will be
8 discussed during the training session.

9 Q. Okay. Who did you have that discussion
10 with?

11 A. Well, there's many. Should I get together a
12 list of names?

13 Q. Any that you can recall?

14 A. Right. So from the most recent trainees, I
15 would guess --

16 Q. Spell the name for me. I'm sorry. Can you
17 give me the name and then spell it for the record,
18 please?

19 A. Sure. I'm just trying to think who to
20 mention. So I don't know why I'm drawing a blank
21 here on the guy's surname. I'm trying to think of
22 another one.

23 So a guy called Jack Dutton, for example.

24 Q. Okay. Is that J-A-C-K, D-U-T-T-O-N?

25 A. That's correct.

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1 Q. Okay. And where does he work? Which
2 office?

3 A. He works for the London Bureau.

4 Q. And what did you tell Mr. Dutton about these
5 particular guidelines?

6 A. I can't recall specifically. But in
7 general, I tell reporters when I'm training them that
8 they must review the guidelines. And also during the
9 training session, when we're talking about images
10 specifically, we'll discuss these guidelines, and
11 I'll be very clear about our procedures in this
12 respect.

13 Q. Okay. And during that conversation, do you
14 inform them that they can display on Newsweek.com
15 photography from Instagram via an embed?

16 MS. GATES: Objection as form.

17 THE WITNESS: No. It doesn't specifically
18 come up, embeds, because this document is about
19 hosting images on our websites.

20 BY MR. BURROUGHS:

21 Q. Okay. Is there a similar document that
22 relates to embedding?

23 A. Not that I'm aware of.

24 Q. So as far as you know, Newsweek, who does
25 have at least one intellectual property policy, has

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1 no policy regarding the use of embeds; correct?

2 MS. GATES: Objection as to form.

3 THE WITNESS: I'm not aware of a very
4 specific policy on embeds. Yeah.

5 BY MR. BURROUGHS:

6 Q. There's no handout like this that you give
7 to your writers regarding embedding; correct?

8 A. No handout.

9 Q. Was Ms. Hignett one of your writers? Did
10 you edit her work?

11 A. Yes. I would have edited her work at times.

12 Q. Okay. About how many of her pieces did you
13 edit?

14 A. I couldn't tell you specifically. Many
15 because she worked with us for quite some time. And
16 on any given day, I might edit a couple or none of
17 her work.

18 Q. Okay. Did you edit the disputed article
19 that we're talking about today?

20 A. I don't recall editing that article.

21 Q. Okay. If you wanted to figure that out,
22 where would you look?

23 A. If I wanted to see if I edited it, I would
24 look in the logs of the article.

25 Q. And have you done that?

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1 A. I did take a look at the logs, and,
2 unfortunately, they don't go that far back. So I
3 can't recall having edited it.

4 Q. How far back do they go?

5 A. Off the top of my head, I can't remember.

6 Q. Okay. So is it accurate to say that you
7 went back to the article log to see whether or not
8 you were involved in the disputed article, and you
9 found that those logs were no longer available?

10 MS. GATES: Objection as to form.

11 THE WITNESS: Yes. That's -- yeah, I had a
12 look at the article and had a look at the logs, and
13 the logs stop at a certain date. I can't remember
14 exactly. And so they weren't particularly
15 informative.

16 BY MR. BURROUGHS:

17 Q. Okay. Do you know who, if anyone, deleted
18 those older logs?

19 MS. GATES: Objection as to form.

20 THE WITNESS: I don't think anyone deleted,
21 although I don't know. I think it's more a case of
22 the system doesn't have a log. For some reason, it
23 maybe cuts off after a certain amount of time. But I
24 think I'm just speculating there.

25 ///

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1 BY MR. BURROUGHS:

2 Q. How far back did the logs go?

3 MS. GATES: Objection. Asked and answered.

4 THE WITNESS: So I think, from my
5 recollection, they go back in detail, so i.e.,
6 recording every action for about three months. But
7 that is -- that could be incorrect. That's based on
8 old knowledge of how the system works. So maybe it's
9 changed since then.

10 BY MR. BURROUGHS:

11 Q. When did you look?

12 A. When did I look at the -- at the logs of
13 this article?

14 Q. (Indicating.)

15 A. Quite recently once I was involved in this
16 deposition process.

17 Q. So is it fair to say within the last couple
18 of weeks?

19 A. That's fair to say, yeah.

20 Q. So you said they go back three months in
21 detail. What records go back further than that?

22 MS. GATES: Objection as to form.

23 THE WITNESS: I'm not aware of any records
24 on the system that go back further than that.

25 ///

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1 BY MR. BURROUGHS:

2 Q. Okay. So when you went back to review the
3 edit logs, you found only three months of extant
4 logging material?

5 A. I'm not sure what the length of time was
6 there. All I can say is it didn't go back far enough
7 to jog my memory on whether or not I edited this
8 article.

9 Q. And what else would be shown in those logs?

10 A. The logs -- it's kind of like a versioning
11 log. So you can just see each date and time stamp
12 when somebody basically hit save on the work they
13 were doing. And -- and then you can, you know,
14 compare each version as you go along to see what
15 changes were made.

16 Q. Okay. And it identifies the person
17 responsible for each of the changes; correct?

18 A. Yes.

19 Q. Okay. What's the name of the program that
20 you use?

21 A. So we have our -- our CMS content management
22 system is custom built. So I don't think it really
23 has a name. It's just that -- it's in-house.

24 Q. Do you know what platform it rides on or
25 what underlying technology it uses?

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1 A. I don't know specifically, no.

2 Q. Okay. Do you know where it's hosted?

3 A. I don't know where it's hosted.

4 Q. Are these logs available to all writers at
5 Newsweek?

6 A. I -- I believe they are available. The
7 writers and the editors can all, you know, have a
8 look at the logs if they need to see changes for some
9 reason.

10 Q. And it is possible to delete content from
11 those logs; correct?

12 A. No. The logs -- you cannot delete the log
13 version. Or at least I'm not aware of, you know, a
14 writer or editor having that ability. I think the
15 reason they don't go back far enough is probably a
16 technical one.

17 Q. So is it fair to say that only -- well,
18 withdraw the question.

19 So writers and editors at Newsweek would not
20 be able to delete information from CMS; correct?

21 A. The writers will not be able to delete
22 information from the CMS. And very senior editors
23 will be able to unpublish an article. But even then,
24 the logging of all of that up to whatever is
25 submitted in the logs is -- is not deletable, as far

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1 as I understand.

2 Q. Okay. Does Newsweek have a document
3 retention program that you're aware of?

4 A. I'm not aware of.

5 Q. At any time before two weeks ago, were you
6 ever advised to maintain records relating to the
7 McGucken dispute?

8 MS. GATES: Objection to the extent we're
9 getting into privileged communications.

10 THE WITNESS: I was not advised to retain.
11 BY MR. BURROUGHS:

12 Q. Have you yourself ever directed any of your
13 writers to display a photograph on Newsweek as part
14 of their article via the embed process?

15 MS. GATES: Objection as to form.

16 THE WITNESS: I probably have done that.

17 BY MR. BURROUGHS:

18 Q. Okay. Do you recall the last time you did
19 that?

20 A. Sorry. Could you just repeat what you said
21 first. The -- direct the writers to do what?

22 Q. Do you direct your writers to display work
23 on Newsweek via Instagram embeds?

24 MS. GATES: Objection as to form.

25 THE WITNESS: Right. In the sense that we

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1 might spot a tweet or an Instagram or something that
2 we think is useful to embed, I may have directed them
3 to or told them to do that. And specifically when I
4 last did that, I can't recall.

5 BY MR. BURROUGHS:

6 Q. But it is part of your practice if you see
7 an appealing photograph on Instagram, you may
8 instruct your writer to go to the photograph, obtain
9 the link, and then -- and display it on Newsweek as
10 part of an article; correct?

11 MS. GATES: Objection as to form.

12 THE WITNESS: Yes. We often will say, embed
13 some of these tweets or Instagram images if they
14 somehow supplement the article.

15 BY MR. BURROUGHS:

16 Q. So if you see a photograph that would be a
17 proper illustrative aid for the article, you'll
18 instruct the writer to display it on Newsweek via the
19 embed process from Instagram; correct?

20 MS. GATES: Objection as to form.

21 THE WITNESS: Yeah. If the Instagram image
22 is sort of part of the story in some way, we'll
23 probably want to include it.

24 BY MR. BURROUGHS:

25 Q. Okay. So if it, for example, illustrates

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1 what's being talked about in the story, that would
2 qualify?

3 MS. GATES: Objection as to form.

4 THE WITNESS: If it -- yeah. If the image
5 is, you know, part of the news in some way, we'll
6 possibly embed it.

7 BY MR. BURROUGHS:

8 Q. And when you're instructing your writers to
9 obtain these illustrative aids for the Newsweek.com
10 articles, do you give them any indication as to
11 whether or not they should reach out to the artist?

12 MS. GATES: Objection as to form.

13 THE WITNESS: So as mentioned earlier, we do
14 like to contact the person who uploaded any image and
15 request permission to host it on our site ourselves,
16 but we may go ahead and embed it if we don't hear
17 back from them.

18 BY MR. BURROUGHS:

19 Q. Okay. So in situations when you are
20 embedding it and displaying it on Newsweek.com via
21 the API, does it matter to you whether or not you
22 have the photographer's consent?

23 MS. GATES: Objection as to form.

24 THE WITNESS: So if we have contacted the
25 person who posted the image, and they for some reason

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1 said, you know, please don't use the image, we'll
2 respect that and don't use it.

3 BY MR. BURROUGHS:

4 Q. But what will you do if they don't respond
5 to your request?

6 A. I mean, it's -- the embed will probably just
7 remain in the article then.

8 Q. So in terms of your approval process, it
9 doesn't sound like the lack of consent from the
10 photographer will stop you from displaying the
11 photograph on Newsweek via an embed; correct?

12 MS. GATES: Objection as to form.

13 THE WITNESS: Yes. It -- you know, as I
14 mentioned, the nature of embedding images allows us
15 to, you know, put them there in the article. And if
16 we don't hear back from the person, not having
17 contact with them, we'll -- the embed will probably
18 remain in the article.

19 BY MR. BURROUGHS:

20 Q. Do you recall Newsweek ever reaching out to
21 an artist before embedding one of their works in an
22 article to advise them that they're going to be doing
23 that?

24 MS. GATES: Objection as to form.

25 THE WITNESS: Sorry. Could you repeat the

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1 question, please?

2 BY MR. BURROUGHS:

3 Q. Do you recall Newsweek ever reaching out to
4 an artist to advise them that Newsweek is going to be
5 displaying their work on Newsweek.com via the embed
6 process?

7 MS. GATES: Objection as to form.

8 THE WITNESS: Yeah. So as mentioned, as
9 part of the process, we contact anyone who has posted
10 an image or what have you to Instagram and request
11 permission to host that on our site. And I suppose
12 in a way that is giving them notice that the image is
13 going to be embedded on their site in the sense
14 that -- yeah.

15 You know, that's just like, you know, sort
16 of a courtesy thing we do to let people have the
17 opportunity to say "Don't embed that image."

18 BY MR. BURROUGHS:

19 Q. Do you recall any circumstances where you
20 reached out to the artist for consent to upload, they
21 didn't respond, and then you followed up and said, "I
22 know you haven't responded, but we're going to
23 display your image anyways using embed"?

24 MS. GATES: Objection as to form.

25 THE WITNESS: So no, I don't remember a

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1 specific instance like that.

2 BY MR. BURROUGHS:

3 Q. So is it fair to say that Newsweek will
4 routinely embed third-party artists' content without
5 advising them that they're doing so?

6 MS. GATES: Objection as to form.

7 THE WITNESS: I don't know about routinely.
8 The routine should be to contact the person who
9 uploaded the image, request permission to host it on
10 our site, and if we don't hear back, we will tend to
11 just go ahead and embed it.

12 BY MR. BURROUGHS:

13 Q. And when you do that, you won't advise the
14 artist that you're embedding it; correct?

15 MS. GATES: Objection as to form.

16 THE WITNESS: Well, the artist, you know,
17 has a message from us saying: "Hello. Can we please
18 host it on our site?" Whether or not they considered
19 that being advised that we're going to embed, I guess
20 that's for them to answer.

21 BY MR. BURROUGHS:

22 Q. Okay. But you see hosting and embedding as
23 two different things; correct?

24 A. Yes.

25 Q. And you testified your message is about

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1 hosting; correct?

2 A. From -- from my recollection of what the
3 reporter said, maybe you can bring that document up.
4 I think she was requesting permission to host it on
5 our site.

6 Q. Okay. So my question is: Do you ever
7 advise them that you're going to be embedding on your
8 site, or do you simply embed without telling the
9 artist?

10 MS. GATES: Objection. Compound.

11 THE WITNESS: So we don't advise that we're
12 embedding. We seek permission to host.

13 BY MR. BURROUGHS:

14 Q. Can you recall Newsweek ever advising an
15 artist that Newsweek planned to display their
16 photography without their consent via an embed?

17 MS. GATES: Objection as to form.

18 THE WITNESS: No. I don't recall us saying
19 we're going to display something without consent.

20 BY MR. BURROUGHS:

21 Q. And it's Newsweek's position that it's under
22 no obligations to either obtain consent from the
23 artist or provide notice to the artist before using
24 their work so long as they use it as an embed;
25 correct?

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1 MS. GATES: Objection as to form and legal
2 conclusion.

3 THE WITNESS: Could you repeat that, please?
4 BY MR. BURROUGHS:

5 Q. Sure. It's Newsweek's position that
6 Newsweek has no obligations to either obtain the
7 consent of the artist or provide notice to the artist
8 before using that artist's content on its website;
9 correct?

10 A. No.

11 Q. How is that incorrect?

12 A. Well, like I said, if we're hosting it, we
13 will seek permission. And if we are embedding it, we
14 don't seek permission because we don't see an embed
15 as sort of a copyright infringement.

16 Q. Okay. So it sounds -- and, again, correct
17 me if I'm wrong. But it sounds like Newsweek's
18 position is -- and tell me if this is accurate.

19 Newsweek is under no obligation to obtain
20 the consent of or provide notice to any artist before
21 displaying that artist's work on Newsweek, so long as
22 Newsweek displays the work via the embed process; is
23 that accurate?

24 MS. GATES: Objection as to form and legal
25 conclusion.

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1 THE WITNESS: Yeah. The structure of that
2 is quite long, so it confuses me a bit. But, you
3 know, as I've stated, we seek permission to host.
4 And if we embed, we don't see the need to seek
5 permission to embed.

6 BY MR. BURROUGHS:

7 Q. Okay. So I'll break it up if I -- that was
8 helpful. That last section there.

9 Is it accurate to say that Newsweek's
10 position is it has no obligations to obtain the
11 consent of a photographer before displaying their
12 work on Newsweek's website, so long as it's displayed
13 via an embed process?

14 MS. GATES: Objection as to form and legal
15 conclusion.

16 THE WITNESS: I think that's a good
17 interpretation of what I said. But it does confuse
18 me a little bit in the length and the way it's put
19 together, the way you phrased it.

20 As I've said, we request permission for
21 hosting, and we'll go ahead and embed with -- you
22 know, regardless.

23 BY MR. BURROUGHS:

24 Q. Right. And as we've discussed, your
25 position is hosting and embedding are -- are two

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1 different things; right? You tend to be collapsing
2 them in response to answers -- so let's focus just on
3 the embedding. Okay?

4 A. Okay.

5 Q. So is it accurate to say that Newsweek's
6 position is that it is under no obligation to obtain
7 the consent of a photographer before displaying that
8 photographer's work on Newsweek via the embed
9 process?

10 MS. GATES: Objection as to form and legal
11 conclusion.

12 THE WITNESS: I -- yeah, sorry. One more
13 time if you wouldn't mind repeating that. Getting a
14 bit flustered, you know?

15 BY MR. BURROUGHS:

16 Q. No problem. Is it Newsweek's position that
17 it has no obligations to obtain the consent of a
18 photographer before displaying that photographer's
19 work on Newsweek.com, so long as Newsweek displays
20 the content via the embed process?

21 MS. GATES: Same objection.

22 THE WITNESS: Yes. I think so.

23 BY MR. BURROUGHS:

24 Q. And is it Newsweek's position that it's
25 under no obligations to provide notice to that

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1 photographer?

2 MS. GATES: Objection as to form and legal
3 conclusion.

4 THE WITNESS: We -- we don't -- we don't
5 contact photographers to say, hey, we're embedding
6 their image. We contact them to request permission
7 to host the image.

8 BY MR. BURROUGHS:

9 Q. Do you give notice that you're going to
10 display their image before displaying it?

11 MS. GATES: Objection as to form.

12 THE WITNESS: Beyond the sort of standard
13 procedure to contact them to request to host, we
14 don't sort of do a specific message saying we are
15 intending to embed this image.

16 BY MR. BURROUGHS:

17 Q. Okay. In your experience with industry
18 standards, or if someone copied the entirety of one
19 of your articles, would you like to have notice
20 first?

21 MS. GATES: Objection as to form.

22 THE WITNESS: Yeah. So if somebody copied
23 the article, I suppose there would have to be a
24 syndication discussion or something along those lines
25 before they could, you know, publish it as their own.

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1 BY MR. BURROUGHS:

2 Q. And let's say you told an article over 15
3 tweets and a publication copied those 15 tweets
4 verbatim -- let me withdraw the question.

5 Suppose you wrote an article over 15 tweets,
6 and another publication, through embed, displayed all
7 of those tweets to its readers, would you want to be
8 given notice of that beforehand?

9 MS. GATES: Objection to form. Speculation.

10 THE WITNESS: Yeah. I mean, I -- it --
11 we -- I don't -- I don't think we would want to or
12 necessarily expect to be given notice if our tweets
13 were being used in another article.

14 BY MR. BURROUGHS:

15 Q. Does Newsweek itself ever create any
16 original photography?

17 A. Possibly, but I don't know specifically.

18 Q. So you don't recall Newsweek ever creating
19 any original photographs; correct?

20 MS. GATES: Objection as to form.

21 THE WITNESS: I don't recall this happening.

22 BY MR. BURROUGHS:

23 Q. Okay. And are most of Newsweek's articles
24 sourced from other sites?

25 MS. GATES: Objection as to form.

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1 THE WITNESS: I don't know about most. But
2 our articles will be sourced from, you know, other
3 sourced -- other publications that -- and a mix of
4 also our own original reporting.

5 BY MR. BURROUGHS:

6 Q. Are you aware of any of your writers doing
7 any reporting that went beyond just reading the
8 internet?

9 MS. GATES: Objection as to form.

10 THE WITNESS: Yes. So them doing original
11 reporting?

12 BY MR. BURROUGHS:

13 Q. Correct.

14 A. Yes.

15 Q. Does Newsweek have a policy regarding
16 reporting out an article or doing research beyond
17 just reading the internet?

18 MS. GATES: Objection as to form.

19 THE WITNESS: Yeah. We -- we sort of -- I
20 wouldn't say it's a policy.

21 But it's kind of like a -- you know, a best
22 practices kind of thing, where we want it to be
23 greater than the sum of the parts. So that should
24 include original comment, putting together multiple
25 streams of information into one place, and, you know,

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1 whatever else we could do to sort of, as I said,
2 create an article that's greater than the sum of its
3 parts. So it's not just a rewriting of something
4 from one source.

5 BY MR. BURROUGHS:

6 Q. Okay. So if an article consisted of nothing
7 more than material sourced from other website
8 articles, would that be in line with what you
9 consider to be best business practices?

10 MS. GATES: Objection as to form.
11 Speculation.

12 THE WITNESS: If the article consisted of
13 information from multiple sources, that would be
14 fine.

15 BY MR. BURROUGHS:

16 Q. If an article consisted of a video taken
17 from another website, a photograph taken from social
18 media, and then quotes taken from a third website,
19 would that for you be an original article under your
20 best business practices?

21 MS. GATES: Objection as to form,
22 speculation, and we're getting outside the scope of
23 the deposition topics.

24 THE WITNESS: Yeah. So -- yeah. If an
25 article contained these multiple elements -- a video,

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1 images from, just for example, people who are on the
2 scene of the news event or whatever it might be that
3 we're covering, and quotes that other publications
4 obtained -- and we sort of package that all together,
5 did some of our own original reporting, sort comments
6 from authorities, people involved, that sort of
7 thing, then that would be a good article I suppose in
8 my books.

9 BY MR. BURROUGHS:

10 Q. Okay. What if that article did not include
11 any, quote, original reporting?

12 MS. GATES: Objection as to form.

13 THE WITNESS: I mean, we're getting into
14 like nitty-gritty of what that means. But if it --
15 if it pulled together lots of sources of information,
16 which you would consider perhaps not original
17 reporting, that would be fine as long as it's, as I
18 said, sort of greater than the sum of its parts
19 there.

20 BY MR. BURROUGHS:

21 Q. Okay. And what if the article did not
22 include any attempts to contact sources?

23 MS. GATES: Objection as to form.

24 THE WITNESS: We would likely ask the
25 reporter to actually contact sources or people

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1 mentioned for comments and stuff like that.

2 BY MR. BURROUGHS:

3 Q. Did Ms. Hignett ever contact anyone in
4 connection with the disputed article we're talking
5 about today?

6 A. From my recollection, she did contact a few
7 experts for comment.

8 Q. Did she contact anyone else?

9 A. Well, of course the photographer in this
10 case as well, I think she contacted him via
11 Instagram.

12 Q. Was that for quotes or was that to use his
13 work for free?

14 MS. GATES: Objection as to form.

15 THE WITNESS: I -- I can't recall
16 specifically. I think we, in the documents, have
17 what she wrote there, so we can refer back to that.

18 BY MR. BURROUGHS:

19 Q. Did Ms. Hignett pose any questions to
20 Mr. McGucken relating to the substance of the
21 article?

22 A. I'm not sure about that. Like I say, the --
23 from memory, I'm not sure. So if we have a look at
24 what she wrote there in her message in our documents
25 here, we could provide that.

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1 Q. Did Ms. McGucken do any background -- I'm
2 sorry. Withdraw the question.

3 Did Ms. Hignett do any background research
4 on Mr. McGucken before publishing the article?

5 A. I don't know about that.

6 Q. Did Ms. Hignett review any of Mr. McGucken's
7 prior work before publishing the article, aside from
8 the image that she displayed?

9 MS. GATES: Objection to the form.

10 BY MR. BURROUGHS:

11 Q. Did Ms. Hignett know anything about
12 Mr. McGucken other than what she obtained from
13 Instagram and the third-party article?

14 MS. GATES: Objection as to form.
15 Speculation.

16 THE WITNESS: I don't know.

17 BY MR. BURROUGHS:

18 Q. So as far as Newsweek knows, Mr. Hignett did
19 no -- or Mrs. Hignett did no background research on
20 Mr. McGucken before publishing the article; correct?

21 MS. GATES: Objection as to form.

22 THE WITNESS: I don't -- I don't know what
23 she did, so I can't really answer that.

24 BY MR. BURROUGHS:

25 Q. And the logs that would reflect that have --

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1 are no longer available; correct?

2 MS. GATES: Objection as to form.

3 THE WITNESS: So the -- I believe we have
4 some e-mails or some communications that she had, but
5 I can't recall the specific details of those.

6 BY MR. BURROUGHS:

7 Q. Does Newsweek do any fact-checking anymore?

8 MS. GATES: Objection as to form.

9 THE WITNESS: We -- we do fact-check our
10 articles.

11 BY MR. BURROUGHS:

12 Q. Was Ms. Hignett's article fact-checked?

13 A. I would assume it was.

14 Q. Okay. Do you know who fact-checked that
15 article?

16 A. I do not, unfortunately.

17 Q. Would that information be in the logs that
18 are no longer available?

19 MS. GATES: Objection as to form.

20 THE WITNESS: Yes.

21 BY MR. BURROUGHS:

22 Q. Okay. As part of that fact-checking
23 process, would Newsweek have reached out to
24 Mr. McGucken to confirm the quotes that are in the
25 article?

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1 A. I'm not sure what processes took place
2 since, you know, I wasn't directly involved in the
3 article.

4 Q. Are you aware of Newsweek's fact-checking
5 procedures and protocols?

6 A. There -- we have, you know, just sort of a
7 general best practices approach as all journalists
8 should have to, you know, verify claims and so on.
9 And we expect our reporters to, you know, follow
10 these sorts of standards.

11 Q. And what are those standards?

12 A. Well, it would just be to actually, you
13 know, research whether what we are writing is true,
14 and if we suspect it is not or it is not from a
15 reliable source, try and corroborate that somehow.

16 Q. Okay. And wouldn't that include whether or
17 not someone said something that's attributed to them
18 in the Newsweek article?

19 A. It may be if we have reason to believe the
20 source we are citing is not reliable for some reason.

21 Q. Okay. And how do you ensure that those
22 standards are followed by your writers and your
23 fact-checkers?

24 A. So a lot of the responsibility is on the
25 reporter to, you know, do this work. Their editor

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1 will oversee their work and review it at times. And,
2 you know, there's always the -- just the general sort
3 of recurring discussion about, you know, what our
4 standards are and, you know, what we expect from our
5 reporters. So it's reinforced that way as well.

6 And as mentioned, some editors, for example,
7 will review an article, and if they have any
8 questions or something strikes them as out of place,
9 they will also flag it.

10 So basically I think multiple levels of
11 checks through this -- throughout the process from,
12 you know, the reporter through the editors to live.

13 Q. How are the records of that kept?

14 A. I would say not really kept because these
15 discussions might be verbal, often organic. So we
16 don't -- you know, we don't have a sort of a big list
17 of every single time we sort of create something.
18 But if it's been sent out via e-mail, I'm sure
19 there's a record of that somewhere.

20 Q. So for example, if a Newsweek staffer
21 reaches out to someone mentioned in the story to
22 confirm a fact, that's not logged anywhere?

23 MS. GATES: Objection as to form.

24 THE WITNESS: So if they reached out via
25 e-mail, there'll be an e-mail record. Or if they did

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1 it via phone, they should have a -- like a recording
2 of that conversation, you know, if we've done an
3 interview or something like that.

4 BY MR. BURROUGHS:

5 Q. Where are those records kept?

6 A. Usually the reporters will retain them. And
7 I'm assuming our e-mail records are on a server or
8 something.

9 Q. So Newsweek itself has no formal document
10 infringement policy for the fact-checking or in photo
11 records; correct?

12 MS. GATES: Objection as to form.

13 THE WITNESS: Not that I can say as a --
14 sort of a formal policy on that.

15 BY MR. BURROUGHS:

16 Q. Have you yourself ever selected a photograph
17 for use in an article?

18 A. Yes.

19 Q. And was that on social media or Getty or
20 somewhere else?

21 A. It may have been through our licensed
22 providers, or I may have seen something on social
23 media that we decided to embed in an article.

24 Q. And you've actually gone into the CMS and
25 used the embed language?

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1 A. Yes. I understand how the system works.

2 Q. And you yourself avail yourself of that
3 system; correct?

4 A. Availed myself meaning?

5 Q. Used it?

6 A. I have used it.

7 MR. BURROUGHS: Okay. We've been going for
8 about two hours. Let's take a quick five or
9 ten-minute break, if anyone has a preference. And
10 we'll come back on the record. What works? Five
11 minutes? Ten minutes?

12 MS. GATES: Let's do ten minutes.

13 MR. BURROUGHS: Ten minutes. So we'll be
14 back at 11:15.

15 (Recess.)

16 BY MR. BURROUGHS:

17 Q. And you understand you're still under oath?

18 A. I do understand that.

19 Q. Okay. So in preparation for today's
20 deposition, did you review any documents?

21 A. With -- with the attorneys.

22 Q. Okay. What documents did you review?

23 A. I believe the ones that relate to this case.

24 Q. What documents do you recall reviewing?

25 A. The -- we had a look at the policy that you

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1 showed me. The -- sorry. I'm drawing a blank here.

2 The article itself is what I wanted to say,
3 just so I knew what I was talking about. And some
4 sort of technical -- some charts of, you know, the
5 traffic that this article generated.

6 Q. Okay. And before looking at the article
7 recently, do you recall ever seeing that article
8 before?

9 A. I have a very sort of hazy recollection of
10 it. You know, it looks familiar. But, yeah, you
11 know nothing in detail.

12 Q. Okay. And do you recall being involved in
13 any way with that article?

14 A. I don't recall being involved with the
15 article.

16 Q. Other than what you've already told me, did
17 you review any other documents in preparation for
18 today?

19 A. The -- there were some -- the documents that
20 are sort of included with this. There were some
21 e-mails I think, but the details escape me of -- you
22 know, there was a lot of stuff in there.

23 Q. Okay. Did you review any of your own
24 records in preparation for today?

25 A. Other than, as mentioned, looking at the log

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1 of that article to see if -- to see if, you know,
2 what happened back there, I didn't.

3 Q. Okay. Did you review your own e-mails to
4 see if you had any correspondence with Ms. Hignett
5 regarding the article at issue?

6 A. I did not review my e-mails for that
7 purpose.

8 Q. Did you review your e-mails for any purpose
9 related to this case?

10 A. No. I think everything I needed to know
11 about this case was provided to me by the attorneys.

12 Q. Understood. And you yourself didn't provide
13 any material to them; correct?

14 A. Other than sort of my knowledge that I have,
15 no.

16 Q. We're going to put in front of you a
17 document we'll mark as Exhibit 11 -- or it was --
18 previously been marked as Exhibit 11.

19 (Plaintiff's Exhibit 11 was
20 previously marked by the court
21 reporter for identification and
22 is attached hereto.)

23 BY MR. BURROUGHS:

24 Q. Do you recognize this document? And if so,
25 how do you recognize it?

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1 A. If you scroll back up there, please, to the
2 headline of the article. Yeah. I mean, this looks
3 like the article we're discussing.

4 Q. Okay. And you understand this to be the
5 article that's at issue in this case; correct?

6 A. Yes.

7 Q. The article that today I've been referring
8 to as the McGucken article or the disputed article;
9 correct?

10 A. Yes.

11 Q. Okay. Now, looking at that -- the first
12 visual there, do you see that it says "continue" on
13 top of it?

14 A. Yes.

15 Q. Okay. Did Newsweek create that video?

16 A. I believe they would have.

17 Q. Okay. So it's your understanding that the
18 video at the top of the disputed article is a video
19 that Newsweek created; correct?

20 A. Yeah. I mean, I don't know specifically,
21 but it looks like the kind of video our video team
22 would have created.

23 Q. Okay. And let's scroll down. Okay. Stop.
24 Do you see that photograph?

25 A. Yes.

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1 Q. Okay. And it's appearing on the
2 Newsweek.com website; correct?

3 A. Yeah. That looks like an embed.

4 Q. Okay. And so a viewer of this article on
5 Newsweek.com would see this McGucken image; correct?

6 A. Yes. It's visible to them.

7 Q. Okay. And they would see the entirety of
8 the McGucken image; correct?

9 A. Yeah. Barring any technical glitches, they
10 should see the embed as it is sort of distributed by
11 Instagram.

12 Q. Okay. Are you aware of any technical
13 glitches related to this article?

14 A. I'm not aware.

15 Q. Okay. And Newsweek did not transform, edit,
16 or alter McGucken's photograph before displaying it
17 to its viewers; correct?

18 MS. GATES: Objection as to form and legal
19 conclusion.

20 THE WITNESS: I don't think we can
21 because -- or could have because it's -- it's posted
22 on Instagram. It's not actually on our site as such.
23 BY MR. BURROUGHS:

24 Q. Okay. And McGucken's photograph is
25 displayed on Newsweek's site next to advertising for

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1 Disney; correct?

2 MS. GATES: Objection as to form.

3 THE WITNESS: It looks that way.

4 BY MR. BURROUGHS:

5 Q. Okay. And Disney paid Newsweek for that
6 advertising; correct?

7 MS. GATES: Objection as to form.

8 THE WITNESS: I don't know about that.

9 BY MR. BURROUGHS:

10 Q. Okay. Are you aware of Newsweek ever
11 offering free advertising to Disney?

12 A. I'm not aware of that.

13 Q. Okay. Are you involved at all in the
14 advertising sales process?

15 A. I am not.

16 Q. Okay. Do you know how Newsweek makes money?

17 A. In broad terms, yes.

18 Q. Okay. How does Newsweek make money?

19 MS. GATES: Objection.

20 THE WITNESS: Advertising is one means.

21 BY MR. BURROUGHS:

22 Q. So it sells advertising?

23 MS. GATES: Objection as to form.

24 THE WITNESS: It -- well, I don't work in
25 that, so I don't know exactly what they do in that

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1 department.

2 BY MR. BURROUGHS:

3 Q. What do you know about what they do in that
4 department?

5 MS. GATES: Objection as to form.

6 THE WITNESS: Not a lot.

7 BY MR. BURROUGHS:

8 Q. Okay. Do they sell advertising?

9 MS. GATES: Objection as to form.

10 THE WITNESS: I would assume so, but I don't
11 know specifically what they do.

12 BY MR. BURROUGHS:

13 Q. Okay. Now, how -- well, let me ask you
14 this. Does Newsweek sell programmatic advertising?

15 MS. GATES: Objection as to form.

16 THE WITNESS: I believe they do.

17 BY MR. BURROUGHS:

18 Q. Does it sell banner advertising?

19 MS. GATES: Objection as to form.

20 THE WITNESS: Could you define "banner
21 advertising"?

22 BY MR. BURROUGHS:

23 Q. A banner ad is generally the advertisement
24 that you'll see at the top of the frame above the
25 content.

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1 A. Can we scroll up and see if there's one
2 here?

3 Q. Sure.

4 A. Is that the banner ad at the top?

5 Q. Is that your understanding of what a banner
6 ad is?

7 A. Well, I -- I guess so. But you asked me not
8 to guess. So you're -- if you define banner ad as
9 the ad at the top, that looks like an ad at the top.

10 Q. What would you call that?

11 A. It looks like an advert.

12 Q. Okay. Is that an advert for which Newsweek
13 was paid?

14 MS. GATES: Objection as to form.

15 THE WITNESS: I don't know the details of
16 how that advert got there.

17 BY MR. BURROUGHS:

18 Q. Okay. So as you sit here today, you have no
19 knowledge of Newsweek's revenues as they pertain to
20 this article; correct?

21 MS. GATES: Objection to the form.

22 THE WITNESS: I -- I don't know, you know,
23 the details of how each of these individual adverts
24 appeared here or why specifically it was Disney or
25 whatever it was. In terms of the revenue for the

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1 article, I believe that is part of the documentation.

2 BY MR. BURROUGHS:

3 Q. Okay. Do you have any personal knowledge of
4 those revenues, or are you basing everything on
5 documents you were shown?

6 A. I'm basing my knowledge on the documents
7 that were shown.

8 Q. You yourself have never sold an
9 advertisement for Newsweek; correct?

10 MS. GATES: Objection as to form.

11 THE WITNESS: I have not.

12 BY MR. BURROUGHS:

13 Q. You yourself are not involved in any
14 transactions relating to the advertisement appearing
15 on this article; correct?

16 MS. GATES: Objection to the form.

17 THE WITNESS: I am not.

18 BY MR. BURROUGHS:

19 Q. You yourself have no personal knowledge of
20 how Newsweek generates revenues; correct?

21 MS. GATES: Objection as to form.

22 THE WITNESS: As I mentioned, in broad
23 terms, yes. We generate revenue from adverts and
24 other means, I'm sure.

25 ///

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1 BY MR. BURROUGHS:

2 Q. So is it accurate to say that the entirety
3 of your knowledge relating to Newsweek's revenues for
4 this article is that Newsweek sells adverts?

5 MS. GATES: Objection as to form.

6 THE WITNESS: I -- I don't -- I'm not aware
7 of any other revenue streams that Newsweek may have
8 as it pertains to this article.

9 BY MR. BURROUGHS:

10 Q. Do you know what a CPM is?

11 A. I believe that means click per mille,
12 which --

13 Q. What does that mean to you?

14 A. Sorry. I'm just trying to rack my brains if
15 I got that definition correct. But I believe it is
16 a -- so the technical term the ads guys use to
17 describe the sort of average revenue per 1,000 clicks
18 on the article.

19 Q. Okay. Is Newsweek compensated on a CPM
20 basis, to your knowledge, by any of its advertisers
21 or partners?

22 A. I don't know specifically the -- how the
23 compensation works for the adverts.

24 Q. Okay. And you would agree that Newsweek is
25 it a for-profit website and company; correct?

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1 MS. GATES: Objection as to form.

2 THE WITNESS: Yeah. I think making a profit
3 is part of the objective.

4 BY MR. BURROUGHS:

5 Q. Okay. And publishing articles is a part of
6 that objective; correct?

7 A. Yes.

8 Q. So you would agree that Newsweek publishes
9 articles like the one we're looking at to make money;
10 correct?

11 MS. GATES: Objection as to form.

12 THE WITNESS: Yes. That's one reason to
13 publish the article.

14 BY MR. BURROUGHS:

15 Q. Okay. And let's scroll down. And let's
16 look at this McGucken photograph again. Based on
17 your experience as an editor, do you believe this
18 photograph to be creative?

19 MS. GATES: Objection as to form.

20 THE WITNESS: I'm not sure -- if you could
21 define "creative" for me in that sense.

22 BY MR. BURROUGHS:

23 Q. Based on your experience in the creative
24 industries?

25 A. That doesn't help me, so I'm not

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1 understanding the question.

2 Q. Okay. So is it your testimony that you
3 personally have no experience ascertaining whether or
4 not a work is creative or not?

5 MS. GATES: Objection as to form.

6 THE WITNESS: Creative in -- can you just
7 define the term "creative"? Then I can answer.

8 BY MR. BURROUGHS:

9 Q. Sure. Reflecting artistic choices.

10 A. Okay. So yeah, if you ask the -- the full
11 question again, please.

12 Q. Do you consider the McGucken photograph to
13 be a creative work?

14 A. Yeah --

15 MS. GATES: Objection as to form.

16 THE WITNESS: -- as a photographer, I
17 suppose he created this image when he took it.

18 BY MR. BURROUGHS:

19 Q. Okay. Would you say this photograph is more
20 or less creative than a spontaneous paparazzi shot of
21 a celebrity on a sidewalk?

22 MS. GATES: Objection as to form.

23 THE WITNESS: I don't -- I mean, I don't
24 really follow the question in that sense.

25 ///

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1 BY MR. BURROUGHS:

2 Q. Okay.

3 A. But both of those images were created by a
4 photographer.

5 Q. Okay. So Newsweek doesn't distinguish
6 creatively between a photograph like the one we're
7 looking at and a spontaneous paparazzi photograph of
8 a celebrity on a sidewalk; correct?

9 MS. GATES: Objection as to form.

10 THE WITNESS: Yeah. I don't -- I mean, as I
11 said, they're both images that were created by a
12 photographer. So we don't --

13 BY MR. BURROUGHS:

14 Q. Okay.

15 A. Yeah. I think that's the answer.

16 Q. Let's scroll down. Do you see this
17 photograph of the landscape?

18 A. Yes, I do.

19 Q. Okay. Did Newsweek create that photograph?

20 A. We did not create it.

21 Q. Okay. And just to close the loop, Newsweek
22 doesn't claim that it created the McGucken
23 photograph; correct?

24 A. I don't believe we do claim we created it.

25 Q. And does Newsweek claim that Mr. Manzel

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1 [sic] ever affirmatively told them that Newsweek
2 could use the photograph on its website?

3 MS. GATES: Objection as to form.

4 THE WITNESS: Sorry. Could you repeat that?
5 You said Mr. who?

6 BY MR. BURROUGHS:

7 Q. Sure. Does Newsweek claim that Mr. McGucken
8 ever gave Newsweek affirmative consent to use that
9 photograph on Newsweek's website?

10 MS. GATES: Objection as to form.

11 THE WITNESS: Do -- sorry. Do we claim that
12 we gave -- he gave us affirmative consent to use it?

13 BY MR. BURROUGHS:

14 Q. (Indicating.)

15 A. I don't think we claim that he gave us
16 affirmative to -- to embed it.

17 Q. Okay. So is it accurate to say -- in this
18 article we're looking at, there's three visual
19 assets; correct?

20 A. Sure. If we're counting this Getty image as
21 one here, the embedded image, and the video at the
22 top.

23 Q. Okay. And of the three, you claim that
24 Newsweek created the video; correct?

25 A. Yeah. In the sense that the video file that

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1 plays was put together by our video editing team.

2 Q. Okay. Do you claim that Newsweek created
3 any of the footage in the video, or is that, again,
4 all third-party footage?

5 A. I don't -- I haven't seen the full video, so
6 I don't know.

7 Q. Okay. Now, if you scroll up, you'll see a
8 quote attributed to Mr. McGucken in the SF Gate. Do
9 you see that? "It's a surreal feeling," et cetera,
10 et cetera?

11 A. Yes, I do.

12 Q. Okay. Now that is not a quote obtained by
13 Newsweek; correct?

14 A. No. It looks like it's from SF Gate.

15 Q. Okay. And that text was copied from SF Gate
16 by Ms. Hignett; correct?

17 MS. GATES: Objection as to form.

18 THE WITNESS: Yeah. Looks like the quote --
19 I mean, I don't know, but that makes sense. Right?
20 She inserted it into her article.

21 BY MR. BURROUGHS:

22 Q. Okay. And then below that, you'll see --
23 you know, below this ad for luxury retirement homes,
24 you'll see language that says: "McGucken said park
25 officials told him the lake appeared to reach a

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1 length of about 10 miles at its peak."

2 Do you see that?

3 A. I do.

4 Q. Now, is that statement based on
5 Ms. Hignett's reporting, or was that also taken from
6 somewhere else?

7 MS. GATES: Objection as to form.

8 THE WITNESS: I don't know where that comes
9 from. But based on -- based on the structure of this
10 article, I'm assuming it came from SF Gate; although
11 I haven't reviewed the SF Gate article to be sure.

12 BY MR. BURROUGHS:

13 Q. And, in fact, it's not clear from the
14 language where that statement came from; correct?

15 MS. GATES: Objection as to form.

16 THE WITNESS: So we've cited our source of
17 where we're getting Mr. McGucken's remarks from. So
18 it -- so it naturally follows that they all came from
19 the same source unless we introduce a new source
20 citation somewhere else.

21 BY MR. BURROUGHS:

22 Q. Okay. So per your business standards and
23 best practices, that statement is properly attributed
24 to the source; correct?

25 MS. GATES: Objection as to form.

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1 THE WITNESS: Just having a quick read here.

2 Yeah. It's been attributed to SF Gate.

3 BY MR. BURROUGHS:

4 Q. Okay. And where do you see that
5 attribution? Are you referring to the preceding
6 paragraph?

7 MS. GATES: Objection as to form.

8 THE WITNESS: Yes.

9 BY MR. BURROUGHS:

10 Q. Okay. Because, in fact, Ms. Hignett never
11 spoke with Mr. McGucken; correct?

12 A. I'm not aware that she spoke to him.

13 Q. Okay. And Newsweek never fact-checked any
14 of these statements; correct?

15 MS. GATES: Objection as to form.

16 THE WITNESS: I -- I don't know whether
17 they -- one of the editors or Ms. Hignett did.

18 BY MR. BURROUGHS:

19 Q. Okay. In fact, Newsweek simply copied this
20 text directly from SF Gate and reprinted it on
21 Newsweek.com; correct?

22 MS. GATES: Objection as to form.

23 THE WITNESS: Well, it depends what you mean
24 by "this text."

25 ///

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1 BY MR. BURROUGHS:

2 Q. Okay. The quotes from Mr. McGucken.

3 A. So the direct quotes would likely be, you
4 know, from SF Gate and cited as such, and any
5 paraphrasing as well, but paraphrasing should not be
6 directly copied.

7 Q. Okay. And Ms. Hignett provided no original
8 reporting to the SF Gate quotes and statements
9 attributed to McGucken here; correct?

10 MS. GATES: Objection as to form.

11 THE WITNESS: By "original reporting," you
12 mean sort of building on what -- what SF -- what was
13 obtained from SF Gate?

14 BY MR. BURROUGHS:

15 Q. Correct.

16 A. I think -- I think we added our own original
17 reporting and -- with comments further down, if you
18 scroll down.

19 Q. And those comments are on the SF Gate
20 material?

21 MS. GATES: Objection as to form.

22 THE WITNESS: Can we scroll down and have a
23 look?

24 BY MR. BURROUGHS:

25 Q. Sure. So take a moment to review that and

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1 tell me how that builds on the SF Gate quotes
2 attributed to Mr. McGucken, if it does?

3 MS. GATES: Objection as to form.

4 THE WITNESS: Right. It's a bit difficult
5 when it's -- I don't have the full article in front
6 of me.

7 BY MR. BURROUGHS:

8 Q. Well, take your time. We're happy to spend
9 as much time looking at it as you want.

10 A. So what I'm looking for here is she -- from
11 my recollection, she cited some experts that she
12 contacted.

13 Q. And did those experts comment on
14 Mr. McGucken's experience?

15 A. Not that I can recall. I'm just trying to
16 see if I can spot something to that effect. Can we
17 scroll up a bit? I'm actually looking for the bit
18 where we got comment from Hannah Cloke, for example.

19 Q. Okay. And before we get to that, I note
20 that the -- well, let's start at the bottom since
21 we're going to be talking about Ms. Cloke. There it
22 is.

23 The original version of this article did not
24 include Hannah Cloke's comment; correct?

25 MS. GATES: Objection as to form.

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1 THE WITNESS: I don't know specifically, but
2 judging from the way we included that update note at
3 the bottom, I would expect -- I would suspect that it
4 did not, and then we added that after it went live.

5 BY MR. BURROUGHS:

6 Q. Do you know when?

7 A. I do not.

8 Q. Okay. Go ahead and scroll up.

9 So take a moment to review and tell me how
10 that builds on the SF Gate reporting about
11 Mr. McGucken?

12 MS. GATES: Objection as to form.

13 THE WITNESS: Right. So I wouldn't say it
14 builds on it. It is just, you know, more -- more
15 reporting on the subject.

16 BY MR. BURROUGHS:

17 Q. Okay. And that reporting is completely
18 unrelated to Mr. McGucken; correct?

19 MS. GATES: Objection as to form.

20 THE WITNESS: Well, it doesn't appear to be
21 commenting about him specifically, but the -- you
22 know, the event of this lake forming rather.

23 BY MR. BURROUGHS:

24 Q. Correct. Correct. And it doesn't appear to
25 be commenting on McGucken's photograph specifically

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1 either; correct?

2 MS. GATES: Objection as to form.

3 THE WITNESS: I don't see it here
4 referencing his photograph.

5 BY MR. BURROUGHS:

6 Q. Okay. Ms. Cloke makes no comment about
7 Mr. McGucken or his photography; correct?

8 MS. GATES: Objection as to form.

9 THE WITNESS: Just double-checking.

10 Not that I can see here from the quotes in
11 front of me.

12 BY MR. BURROUGHS:

13 Q. Okay. In fact, there's nothing in this
14 article that comments on or criticizes Mr. McGucken
15 or his photography; correct?

16 MS. GATES: Objection as to form.

17 THE WITNESS: Well, I think we talk about
18 him if we scroll down. As you can see, we're
19 mentioning his name and including some of his quotes
20 of his, you know, experience capturing this event.

21 BY MR. BURROUGHS:

22 Q. And I believe you've testified that that
23 material was all taken from SF Gate and at most
24 paraphrased; correct?

25 MS. GATES: Objection as to form.

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1 THE WITNESS: Yeah. It appears the quotes
2 were sourced from SF Gate, and some of the additional
3 information as well.

4 BY MR. BURROUGHS:

5 Q. Okay. So other than the material taken from
6 SF Gate, Newsweek does not comment or criticize
7 Mr. McGucken or his work at all in this piece;
8 correct?

9 MS. GATES: Objection as to form.

10 THE WITNESS: If we just scroll to the
11 bottom, please.

12 So can you repeat that question, please?

13 BY MR. BURROUGHS:

14 Q. Sure. Other than the material that
15 Ms. Hignett copied from SF Gate, and at most
16 paraphrased, about Mr. McGucken, this article doesn't
17 criticize or comment Mr. McGucken or his photography
18 at all, does it?

19 MS. GATES: Objection as to form.

20 THE WITNESS: I did not spot any criticism
21 of his photography. And if we just scroll up to his
22 image again, please. Whether we commented on it,
23 I -- you know, I think the -- there's no specific
24 comment. Although we do include his own words.
25 Right? Saying, you know, how -- his own comments on

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1 the event.

2 BY MR. BURROUGHS:

3 Q. Okay. So is it accurate to say that the
4 only comments about the photography in this Newsweek
5 article are Mr. McGucken's comments?

6 MS. GATES: Objection as to form.

7 THE WITNESS: I guess that's -- that's fair
8 to say.

9 BY MR. BURROUGHS:

10 Q. Okay. Can you point out any other comments
11 on Mr. McGucken's photography in this Newsweek
12 article other than Mr. McGucken's comments?

13 A. I did not notice any.

14 Q. Okay. Scroll down again to the bottom.

15 Do you know who appended the clarification
16 referencing Ms. Cloke at the bottom of this article?

17 A. I do not know specifically who did.

18 Q. If you wanted to know that, where would you
19 look?

20 A. I would want to check the article log.

21 Q. Okay. And that would -- those logs are --
22 again, they're -- they no longer exist; correct?

23 MS. GATES: Objection as to form.

24 THE WITNESS: I don't know if -- you know,
25 they exist somewhere on the system. But I can't

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1 access the changes to figure out who added that
2 comment at the bottom, for example.

3 BY MR. BURROUGHS:

4 Q. Okay. So as a managing editor of Newsweek,
5 the only records that would indicate to you when the
6 appendage was made are no longer available to you;
7 correct?

8 MS. GATES: Objection as to form.

9 THE WITNESS: It currently seems that way
10 unless there's a -- as I say, some other log that I'm
11 not aware of.

12 BY MR. BURROUGHS:

13 Q. As a managing editor, would there be logs
14 you're not aware of, of articles?

15 MS. GATES: Objection as to form.

16 THE WITNESS: It's -- it's possible. I
17 don't -- and I don't know exactly all the technical
18 details of how the system operates and how logs are
19 stored.

20 BY MR. BURROUGHS:

21 Q. Okay. Do you know who added the
22 Hannah Cloke material to this article after it was
23 published?

24 MS. GATES: Objection. Asked and answered.

25 THE WITNESS: I don't know specifically. I

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1 will assume it was the reporter.

2 BY MR. BURROUGHS:

3 Q. Was she directed to add that material by
4 anyone at Newsweek?

5 A. In a general sense. She would -- it's just
6 our practice, if we receive some comment back, we
7 will include that comment.

8 Q. Okay. Do you know if that happened in this
9 case?

10 A. It appears that way.

11 Q. Okay. At the time of this article's
12 publication, who would have given that direction on
13 behalf of Newsweek?

14 A. So as mentioned, it's more of a general
15 practice to include comments once received. So to
16 say somebody specifically told her to do it, I don't
17 think I can answer that.

18 Q. Okay. So you have no personal knowledge of
19 when, how, why, or at whose direction this Cloke
20 material was added to the piece; correct?

21 MS. GATES: Objection as to form. Compound.

22 THE WITNESS: Nothing -- I couldn't tell you
23 specifically. No.

24 BY MR. BURROUGHS:

25 Q. Okay.

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1 A. But as mentioned, it's just general practice
2 to include comments once we've received it.

3 Q. Okay. The only records that would reflect
4 that information have been destroyed or are otherwise
5 unavailable; correct?

6 MS. GATES: Objection as to form.

7 THE WITNESS: I'm not aware of any existing,
8 you know, log of the fine details of who inserted
9 this comment and when.

10 BY MR. BURROUGHS:

11 Q. Okay. But it's your understanding that that
12 material, or those facts relating to when this
13 content was inserted, would have been in those logs
14 that you looked for but were unable to find because
15 they were no longer on the system; correct?

16 MS. GATES: Objection as to form.

17 THE WITNESS: Yeah. It -- I could
18 essentially look at the log and see who -- you know,
19 which name was registered in the log, who made the
20 updates. And on that basis, we could infer that that
21 person did it.

22 BY MR. BURROUGHS:

23 Q. And that would also give you the date;
24 correct?

25 A. Yes. The date, the time stamp. It's quite

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1 specific, yes.

2 Q. Did Newsweek eventually remove the McGucken
3 photograph from this article?

4 A. Yes. I think they did.

5 Q. Were you involved in that process at all?

6 A. I was not.

7 Q. Do you have any knowledge about the decision
8 to remove the item or the length of time it took or
9 any facts relating to that removal?

10 MS. GATES: Objection as to form. Compound.

11 THE WITNESS: I don't have detailed
12 knowledge of that.

13 BY MR. BURROUGHS:

14 Q. Why did Newsweek remove the photograph?

15 MS. GATES: Objection as to form.

16 THE WITNESS: I don't know what the -- what
17 the thought process was behind that decision.

18 BY MR. BURROUGHS:

19 Q. Okay. And you don't know when it happened
20 either, do you?

21 MS. GATES: Objection as to form.

22 THE WITNESS: I don't specifically know when
23 it happened, no.

24 BY MR. BURROUGHS:

25 Q. Does Newsweek have a policy for responding

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1 to cease and desist letters or copyright notices?

2 A. Sorry. Is that feedback from me or someone
3 else?

4 (Recess.)

5 THE WITNESS: Okay. Sorry. Could you
6 repeat the question, please?

7 BY MR. BURROUGHS:

8 Q. Sure. Does Newsweek have a policy for
9 responding to cease and desist letters and/or
10 copyright notices?

11 A. I'm not aware of -- of a policy on that.

12 Q. Okay. Now, was any other material removed
13 from the article that we're looking at in Exhibit 11?

14 A. I'm not aware of other material being
15 removed.

16 Q. Was the video ever removed?

17 A. Again, I'm not aware of the video being
18 removed.

19 Q. So let's look -- scroll back up and look at
20 the McGucken photograph again.

21 So is Newsweek displaying the McGucken
22 photograph here to illustrate the story?

23 MS. GATES: Objection to the form.

24 THE WITNESS: It looks like -- you know,
25 like a supplemental image. It captured this rare

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1 moment. So you know, that's why it's included.

2 Yeah.

3 BY MR. BURROUGHS:

4 Q. So it's illustrating this story about this
5 moment in Death Valley; correct?

6 MS. GATES: Objection as to form.

7 THE WITNESS: It's an image of that moment.

8 BY MR. BURROUGHS:

9 Q. Does this photograph not illustrate the
10 story that it's incorporated in on Newsweek?

11 MS. GATES: Objection as to form.

12 THE WITNESS: It is part of the news event.

13 BY MR. BURROUGHS:

14 Q. Okay. So it's accurate to say that the
15 McGucken photograph is being used as an illustrative
16 aid to illustrate the article that we're looking at
17 in Exhibit 11; correct?

18 MS. GATES: Objection as to form.

19 THE WITNESS: The image, you know, shows the
20 event as captured by Mr. McGucken.

21 BY MR. BURROUGHS:

22 Q. Okay. So it shows the event; correct?

23 A. It appears to, yes.

24 Q. So it illustrates the event that's being
25 discussed in the article; is that your testimony?

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1 MS. GATES: Objection as to form.

2 THE WITNESS: Well, I mean, it's a picture
3 of this lake. So that's what we reported on.

4 BY MR. BURROUGHS:

5 Q. Is it used for any other purpose aside from
6 illustrating the story?

7 MS. GATES: Objection as to form.

8 THE WITNESS: Well, the purpose was to, you
9 know, supplement the news of this event with some
10 firsthand accounting from someone who was there.

11 BY MR. BURROUGHS:

12 Q. Okay. Other than illustrating the article
13 and supplementing the account, is it being used for
14 any other purpose?

15 MS. GATES: Objection as to form.

16 THE WITNESS: I'm not really sure I
17 understand what's the purpose you're getting at.

18 BY MR. BURROUGHS:

19 Q. Okay. So other than what you've told me,
20 you're unaware of any other purpose for which this
21 photograph was used; correct?

22 MS. GATES: Objection as to form.

23 THE WITNESS: Other than to show that the
24 event took place and this is what it looks like, I
25 don't see there's another, you know, purpose of the

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1 image. It's just -- it's part of the news event, so
2 it's in the article.

3 BY MR. BURROUGHS:

4 Q. Did SF Gate also publish this photograph?

5 A. I'm not aware of what they did.

6 Q. Assuming SF Gate did publish this
7 photograph, would they have been using it for the
8 same purpose as Newsweek?

9 MS. GATES: Objection as to form.

10 THE WITNESS: I don't know what SF Gate did,
11 so I can't speculate.

12 BY MR. BURROUGHS:

13 Q. Okay. Can you articulate any difference
14 between the purpose for Newsweek's display of this
15 photograph and Mr. McGucken's display of the
16 photograph?

17 MS. GATES: Objection as to form.

18 THE WITNESS: I don't -- I don't know -- I
19 don't know what Mr. McGucken's purpose might have
20 been to display the photograph.

21 BY MR. BURROUGHS:

22 Q. Okay. So as you sit here today, you can't
23 articulate any difference between his display of the
24 work and your display of the work in terms of
25 purpose; correct?

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1 MS. GATES: Objection as to form. Misstates
2 testimony.

3 THE WITNESS: So I can't because I don't
4 know what his purpose was. So to -- to -- I'd just
5 be sort of dreaming up some sort of idea of what the
6 difference is.

7 BY MR. BURROUGHS:

8 Q. Okay. Does Newsweek's use of McGucken's
9 photograph depict what's being talked about in the
10 article?

11 MS. GATES: Objection as to form.

12 THE WITNESS: The -- the embedded photograph
13 shows the news event that we reported on.

14 BY MR. BURROUGHS:

15 Q. Okay. So it's accurate to say that it
16 depicts the subjects described in the article;
17 correct?

18 MS. GATES: Objection as to form.

19 THE WITNESS: Sorry. Can you repeat the
20 question?

21 BY MR. BURROUGHS:

22 Q. Is it accurate to say that the McGucken
23 photograph depicts the subjects described in the
24 article?

25 MS. GATES: Same objection.

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1 THE WITNESS: The subject being the lake?

2 BY MR. BURROUGHS:

3 Q. The subjects described in the article.

4 A. So I'm just checking. You mean the subject
5 being the news of this lake being formed?

6 Q. It -- I don't -- it's your understanding
7 what the subject of this article is as the managing
8 editor of Newsweek. If you're telling me you don't
9 know what the subject of the article is, that's okay
10 too. You can tell me that.

11 A. Right. So the subject of the news article
12 is this lake has been formed, and this embedded image
13 demonstrates, you know, that -- you know, what that
14 might have looked like.

15 Q. Okay. So is it accurate to say that the
16 photograph depicts the subjects described in the
17 article?

18 MS. GATES: Objection as to form.

19 THE WITNESS: It's an image of the news
20 event, yes.

21 BY MR. BURROUGHS:

22 Q. Okay. Do you contend that your use of this
23 McGucken image served an important public purpose?

24 MS. GATES: Objection as to form.

25 THE WITNESS: Well, it -- it did in the

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1 sense that this is a rare event, a phenomenon, and
2 people wouldn't have been able to see it. So this
3 is -- in that sense, yes. Because it's -- you know,
4 it shows them what that event might have looked like
5 if they weren't able to see it themselves.

6 BY MR. BURROUGHS:

7 Q. Okay. So it's Newsweek's position that if
8 Newsweek hadn't displayed McGucken's photograph, the
9 public wouldn't have been able to see this
10 photograph?

11 MS. GATES: Objection as to form.

12 THE WITNESS: No, because the image is
13 posted on Instagram. They can go look at it over
14 there, which essentially is what they're doing,
15 they're looking at Instagram through our web page.

16 BY MR. BURROUGHS:

17 Q. Okay. But I believe you testified -- and I
18 don't want to put words in your mouth -- but if
19 Newsweek hadn't displayed McGucken's photograph, the
20 public wouldn't have been able to see it.

21 Do you recall saying that under oath?

22 MS. GATES: Objection as to form. Misstates
23 testimony.

24 THE WITNESS: No. I didn't say that.

25 ///

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1 BY MR. BURROUGHS:

2 Q. Okay. The public would have been able to
3 see this photograph even if you hadn't displayed it
4 without the artist's consent; correct?

5 MS. GATES: Objection as to form.

6 THE WITNESS: The image is available on
7 Instagram, and it's displayed publicly on Instagram,
8 so they could have seen it there.

9 BY MR. BURROUGHS:

10 Q. Was the image online anywhere else, any
11 other publications, to your knowledge?

12 A. I don't know about that.

13 Q. Have you ever undertaken a search to see
14 where else online this image may have been published
15 or posted?

16 A. I have not.

17 Q. Okay. So assuming that this image is
18 available on another publication's website, do you
19 still believe that your display of it serves an
20 important public purpose?

21 MS. GATES: Objection as to form.

22 THE WITNESS: Yes. We -- you know, news
23 websites all compete to, you know, report the news.
24 So this is how these things work. We wouldn't just
25 not report a phenomenon like this because someone

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1 else has.

2 BY MR. BURROUGHS:

3 Q. Any other reason?

4 A. Any other reason for what? Sorry.

5 Q. For why you believe it served an important
6 public purpose to display his work without his
7 consent?

8 MS. GATES: Objection as to form.

9 THE WITNESS: So we embedded this image in
10 our article, and we sought consent to host it.

11 BY MR. BURROUGHS:

12 Q. Okay. Any other reasons?

13 A. Sorry. Sorry. Got lost on the question.
14 Any other reason for?

15 Q. I asked if you believe that your display of
16 his photograph served an important public purpose.
17 And I'm asking, other than what you've told me, is
18 there any other basis for that belief?

19 MS. GATES: Objection as to form.

20 THE WITNESS: I think I've told you why it
21 serves public purpose.

22 BY MR. BURROUGHS:

23 Q. Okay. So there's no other basis that you
24 can think of; correct?

25 MS. GATES: Objection as to form.

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1 THE WITNESS: Can you remind me of what I
2 said already now?

3 BY MR. BURROUGHS:

4 Q. If you don't recall, you can tell me again.

5 A. So yeah, the -- this image is serving a
6 public purpose because it so captures this rare
7 event.

8 Q. Any other reason?

9 MS. GATES: Objection as to form.

10 THE WITNESS: Well, you know, I'm racking my
11 brains. I mean, that's a fairly broad description,
12 so let me just think.

13 No, yeah, I think it's fair to say that this
14 image captures that news event, and that's the
15 sort -- the public purpose of it, is to -- you know,
16 it's a record of this rare phenomenon.

17 BY MR. BURROUGHS:

18 Q. Okay. Could Newsweek have published this
19 article about the Death Valley lake without using
20 McGucken's photograph?

21 MS. GATES: Objection as to form.

22 THE WITNESS: Could we have published it
23 without the embedded image?

24 BY MR. BURROUGHS:

25 Q. (Indicating.)

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1 A. We could have. But then it would fall
2 somewhat short of, you know, demonstrating what the
3 event looked like.

4 Q. Okay. And why would that be?

5 A. Well, simply because we didn't have an image
6 of the event, so we'd have to describe it in, you
7 know, word form.

8 Q. Would that require more reporting from
9 Newsweek?

10 MS. GATES: Objection as to form.
11 Speculation.

12 THE WITNESS: Arguably, yes, the -- you
13 know, it depends on how descriptive you want to be in
14 writing.

15 BY MR. BURROUGHS:

16 Q. Okay. So is it accurate to say that
17 Newsweek still could have reported on the Death
18 Valley lake without using the McGucken photograph,
19 but the article wouldn't have been as appealing or it
20 would have required more work on the part of Newsweek
21 in reporting?

22 MS. GATES: Objection as to form. Compound.
23 Speculation.

24 THE WITNESS: We could have reported the
25 story without embedding the image, perhaps. I don't

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1 know about more work or whether it would have been
2 worse in any way. But because the image was
3 available to embed, it served -- it was included as
4 a -- sort of a supplement to all the information we
5 gathered on the event.

6 BY MR. BURROUGHS:

7 Q. Okay. So is it fair to say that if you
8 didn't have Mr. McGucken's firsthand accounts of the
9 Death Valley lake, you would have had to send a
10 reporter to do some investigation or some due
11 diligence to obtain such information?

12 MS. GATES: Objection as to form.
13 Speculation.

14 THE WITNESS: Not necessarily. Because we
15 included the comment from experts on the event, and
16 there was reporting from other, you know, reputable
17 sites that this happened.

18 BY MR. BURROUGHS:

19 Q. Okay. But the article itself is still
20 viable and meets your publishing standards even
21 without the McGucken photograph; correct?

22 MS. GATES: Objection as to form.

23 THE WITNESS: Yes.

24 BY MR. BURROUGHS:

25 Q. Okay. And, in fact, Newsweek is still

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1 publishing and making available online this article
2 without the McGucken photograph; correct?

3 A. Yes.

4 MS. GATES: Objection as to form.

5 BY MR. BURROUGHS:

6 Q. Do you believe, based on your industry
7 experience, that using photographers' firsthand
8 reporting and creative works in your articles without
9 compensation affects their ability to license their
10 work?

11 MS. GATES: Objection as to form.

12 THE WITNESS: Sir, that's a complicated
13 question. Can you repeat it, please?

14 BY MR. BURROUGHS:

15 Q. Sure. Does Newsweek believe that using
16 photography from third-party artists without
17 compensating them affects that photographer's ability
18 to license its photography?

19 MS. GATES: Same objection.

20 THE WITNESS: We -- we wouldn't -- we
21 wouldn't host an image on our site without licensing
22 it.

23 BY MR. BURROUGHS:

24 Q. Sure. But do you believe that hosting it on
25 your site or embedding it on your site without

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1 compensating the artist impacts that artist's ability
2 to license their work or otherwise make a living?

3 MS. GATES: Objection as to form.

4 THE WITNESS: I don't think I can comment on
5 that at all.

6 BY MR. BURROUGHS:

7 Q. So it's Newsweek's position that it doesn't
8 know one way or the other whether displaying an
9 artist's work without paying them affects their
10 ability to license their work; is that accurate?

11 MS. GATES: Objection as to form. Misstates
12 testimony.

13 THE WITNESS: I don't think that's what I
14 said. The -- as I said, we host on our site images
15 that we have licensed. And the rest of the question
16 seems to be really just merely speculating.

17 BY MR. BURROUGHS:

18 Q. Okay. What, if anything, is Newsweek's
19 position on whether or not Newsweek's display of
20 photographs without compensating the photographer
21 affects that photographer's ability to license the
22 photograph?

23 MS. GATES: Objection as to form. We're
24 getting outside the scope of the deposition topics
25 here.

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1 BY MR. BURROUGHS:

2 Q. Go ahead.

3 A. Please repeat the question.

4 Q. Sure. What is Newsweek's position, if any,
5 on whether or not Newsweek's display of photographs,
6 without licensing the photograph from the
7 photographer, affects that photographer's ability to
8 license its work?

9 MS. GATES: Same objection.

10 THE WITNESS: We -- we don't host images
11 that we haven't licensed, is our policy.

12 BY MR. BURROUGHS:

13 Q. Okay. Does the display of those images via
14 embed affect the photographer's ability to license or
15 otherwise monetize that work?

16 MS. GATES: Objection as to form.

17 THE WITNESS: I don't -- I don't know about
18 that.

19 BY MR. BURROUGHS:

20 Q. Okay. As an editor, would you be more or
21 less likely to use a work depicting a landscape that
22 had already appeared on numerous other websites?

23 MS. GATES: Objection as to form.

24 THE WITNESS: I -- I don't think so. More
25 or less likely -- I think if it's good, we'll use it.

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1 BY MR. BURROUGHS:

2 Q. Does the exclusive nature of the photograph,
3 in the sense that you may be one of the only
4 publications to display the photograph, affect your
5 decision-making in whether or not to run a
6 photograph?

7 MS. GATES: Objection as to form.

8 THE WITNESS: No.

9 BY MR. BURROUGHS:

10 Q. Okay. I'm going to put a document in front
11 of you we're going to mark as Exhibit 12. It's
12 coincidentally Newsweek 12, screenshot of Ms. Rice.

13 (Plaintiff's Exhibit 12 was marked
14 for identification by the court
15 reporter and is attached hereto.)

16 BY MR. BURROUGHS:

17 Q. Tell me if you've -- if you've seen this
18 document before.

19 A. I have.

20 Q. Okay. And what is this document, and how do
21 you recognize it?

22 A. This looks like the -- our CMS's internal
23 statistics for this article.

24 Q. And what is it showing?

25 A. It's not showing a lot. Can we scroll down

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1 a bit?

2 Q. Yes.

3 A. Shall I talk top to bottom?

4 Q. Yes.

5 A. Okay. So the -- the top statistics there,
6 as the label suggests, just shows the amount of
7 traffic it's received on an hourly basis from the
8 channel there. It's divided up in search, social,
9 links, and internal and direct.

10 So basically this is showing, for example,
11 it had one visitor at -- on Tuesday at 9:00 a.m. on
12 whatever date this screenshot was taken.

13 Q. So is this reflecting two days of traffic?

14 A. It seems to be, as it says Tuesday and
15 Wednesday here.

16 Q. Okay. Does Newsweek have the same data
17 going back to the date the article at issue was
18 posted?

19 A. We should have the -- not -- perhaps not
20 here on this internal statistics, but in another form
21 there would be some sort of record of the traffic the
22 article received.

23 Q. Have you reviewed that information?

24 A. Yes. I had a look at the document that was
25 provided as part of this case.

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1 Q. Okay. Now, this is not a document that you
2 generated; correct?

3 A. This is just generated in the back end of
4 our system. If you're asking if I screenshotted
5 this, I did not.

6 Q. Okay. I'm going to direct your attention to
7 Exhibit 13, which is coincidentally Newsweek 13.

8 (Plaintiff's Exhibit 13 was marked
9 for identification by the court
10 reporter and is attached hereto.)

11 BY MR. BURROUGHS:

12 Q. Do you recognize this document?

13 A. Yes. This looks to be the same sort of area
14 of the CMS with the statistics. I will assume it's
15 the same article.

16 Q. Is there any way of telling by looking at
17 the document what article this references?

18 A. Not -- not at this specific screenshot. But
19 I'm assuming it's just the continuation of the
20 previous one.

21 Q. Okay. Can you tell from looking at this
22 what time period this covers?

23 A. Sorry. Let me get my Zoom guys out of the
24 way. It doesn't seem to, at least from what I can
25 see here. If we scroll down maybe. Uh-huh. Okay.

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1 That -- yeah, so as it says by the label,
2 traffic in the last 40 days up to 13 January '20.

3 Q. Okay. So this exhibit, like Exhibit 12,
4 doesn't reflect the full traffic for the article at
5 issue; correct?

6 A. I don't think so. Since the article was up
7 longer than 40 days.

8 Q. Okay. We're now going to look at exhibit --
9 we're going to look at a document marked Exhibit 14,
10 Newsweek 14.

11 (Plaintiff's Exhibit 14 was marked
12 for identification by the court
13 reporter and is attached hereto.)

14 BY MR. BURROUGHS:

15 Q. Have you seen this document before, and if
16 so, how do you recognize it? Is it --

17 A. This looks like the back end of the article.
18 So the editing side of the article.

19 Q. Is -- this how it would appear in your CMS
20 system?

21 A. That's right.

22 Q. Okay. And if can scroll all the way down to
23 the bottom just so you can see the entire thing.

24 So you'll see that content section; correct?

25 A. Yes.

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1 Q. What usually appears in that content
2 section?

3 A. That will be the bulk of the article that is
4 visible on the front side of the site.

5 Q. Okay. And that will include copies of the
6 visual assets that are in the article; correct?

7 A. It will show the video, the embeds, the
8 image we hosted.

9 Q. Okay. So we would see McGucken's photograph
10 in this back end if it was still online; correct?

11 A. If -- if -- if the embed was still in the
12 back end, we should see it here.

13 Q. Yeah. So --

14 (Speaking simultaneously.)

15 THE WITNESS: -- indication of, you know,
16 where it is in this -- in the article.

17 BY MR. BURROUGHS:

18 Q. Okay. So the fact that you don't see a copy
19 of the McGucken photograph here, does that indicate
20 to you that this screen capture was created recently?

21 MS. GATES: Objection as to form.

22 THE WITNESS: So this isn't actually the
23 entirety of the body, so I can't -- I don't actually
24 know if the embed is there or not. I assume there's
25 another part of this image somewhere.

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1 BY MR. BURROUGHS:

2 Q. Okay. What does "non-verified, expired"
3 mean to you?

4 A. That, from my knowledge, is just related to
5 the -- the video team's operations. And how they --
6 you know, we may have an advertising campaign, for
7 example, that will only run on a video for a certain
8 amount of time. And I think they can program the
9 sorts of details in, but it's not something I am
10 involved in.

11 Q. Does Newsweek have a procedure for verifying
12 visual assets before it publishes them or displays
13 them on its website?

14 MS. GATES: Objection as to form.

15 THE WITNESS: Yeah. So the usual sort of
16 journalistic practices of fact-checking whatever the
17 visual asset is is -- is probably taking place here.
18 Again, the video team is responsible, and I don't
19 have any direct involvement with them.

20 BY MR. BURROUGHS:

21 Q. Okay. Is there any indication on this
22 exhibit that this article was fact-checked?

23 MS. GATES: Objection as to form.

24 THE WITNESS: I mean, not -- no.

25 ///

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1 BY MR. BURROUGHS:

2 Q. Okay. Is there any indication on this -- on
3 this exhibit that the artist for the visuals that are
4 displayed in the Newsweek article gave consent for
5 that display?

6 MS. GATES: Objection as to form.

7 THE WITNESS: Sorry. Can you repeat the
8 question?

9 BY MR. BURROUGHS:

10 Q. Sure. Is there any indication in this
11 exhibit that the creators of the visual assets
12 displayed in the Newsweek article gave consent for
13 that display?

14 MS. GATES: Objection as to form.

15 THE WITNESS: Not in this exhibit from what
16 I can see here.

17 BY MR. BURROUGHS:

18 Q. Where, if anywhere, would that information
19 appear?

20 MS. GATES: Objection as to form.

21 THE WITNESS: So I believe the -- I don't --
22 again, if we could see the rest of this exhibit, the
23 rest of the article in the back end, you will -- you
24 should be able to see sort of a little credit --
25 sorry -- a little credit at the bottom of the video

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1 and at the bottom of the hosted image.

2 BY MR. BURROUGHS:

3 Q. Okay.

4 A. And just to add to that, I don't know this
5 video specifically, what is going to be played here,
6 but often credit is included in the video, a sort of
7 end card itself.

8 Q. Okay. But if that didn't exist, would there
9 be any other place where the identities of the
10 photographers or the -- or whether or not they gave
11 consent was indicated?

12 MS. GATES: Objection as to form.

13 THE WITNESS: So no, no image that is hosted
14 in our system should be hosted in our system if we
15 don't have a license to use it. And when we do
16 upload that image, it includes the name of the
17 photographer or the image library that supplied it to
18 us.

19 BY MR. BURROUGHS:

20 Q. Where does it include that name?

21 A. So there's sort of like a separate section
22 of the CMS where you can see all the images, for
23 example, and all of the information related to the
24 images is contained there.

25 Q. And if the document we're looking at

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1 existed, then there would absolutely be a page
2 reflecting that visual information as well; correct?

3 MS. GATES: Objection as to form.

4 THE WITNESS: Yeah. So -- so there's
5 also -- sorry. I'm not sure I'm fully understanding
6 the question.

7 BY MR. BURROUGHS:

8 Q. Sure. Well, have you yourself seen the
9 screen where the copy of Mr. McGucken's photograph
10 appears in this system?

11 MS. GATES: Objection as to form.
12 Speculation.

13 THE WITNESS: There's no copy of his image
14 in our system.

15 BY MR. BURROUGHS:

16 Q. Okay. So have you seen his image appear
17 anywhere in your system?

18 A. Aside from the embedded aspect where we will
19 see the image, I haven't seen it. It's not hosted on
20 our system. It's -- the image itself resides on
21 Instagram. It doesn't reside on our system.

22 Q. But I believe you testified it's visible in
23 your system; correct?

24 MS. GATES: Objection as to form.

25 THE WITNESS: The Instagram embed provides a

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1 window. The code provides a window to that content,
2 which is hosted on Instagram.

3 BY MR. BURROUGHS:

4 Q. And you're able to view that in your system,
5 correct, the actual image?

6 MS. GATES: Objection as to form.

7 THE WITNESS: Yes. You can -- you can see a
8 sort of a window into what that content is over on
9 Instagram.

10 BY MR. BURROUGHS:

11 Q. And you sitting at your computer accessing
12 Newsweek's proprietary system can also see that image
13 on Newsweek's proprietary system; correct?

14 MS. GATES: Objection as to form.

15 THE WITNESS: Yes. I have a view of what
16 the image is over on Instagram, whatever the embed
17 is.

18 BY MR. BURROUGHS:

19 Q. Okay. And you're viewing that within the
20 Newsweek platform; correct?

21 MS. GATES: Objection as to form.

22 THE WITNESS: Yes. The embed is within our
23 content creation system here.

24 BY MR. BURROUGHS:

25 Q. Okay. I'm going to put a document in front

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1 of you we're going to mark as Exhibit 15. Please
2 take a moment to look at that document. It's
3 Newsweek 15.

4 (Plaintiff's Exhibit 15 was marked
5 for identification by the court
6 reporter and is attached hereto.)

7 BY MR. BURROUGHS:

8 Q. Do you recognize this document, and if so,
9 how?

10 A. Yes. This looks like the bottom half of the
11 previous exhibit we were discussing.

12 Q. Okay. And here again we see one of the
13 visual assets that was incorporated into the disputed
14 article; correct?

15 A. This looks like the image -- the sort of
16 stock image that we hosted.

17 Q. Okay. Is that how you would refer to this
18 article -- this image that we're seeing in
19 Exhibit 15, as a stock image?

20 MS. GATES: Objection as to form.

21 THE WITNESS: Well, yeah, colloquially
22 speaking, it's -- it was obtained off of Getty, I
23 think. If we could scroll down, we might see the
24 source of the image. Yes. So that -- I mean, that's
25 like a wire image of Death Valley.

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1 BY MR. BURROUGHS:

2 Q. Okay. Would you also refer to the McGucken
3 photograph as a stock image, or would you refer to it
4 as something else?

5 MS. GATES: Objection as to form. Compound.

6 THE WITNESS: I wouldn't refer to it as a
7 stock image. It's an embedded image.

8 BY MR. BURROUGHS:

9 Q. Would you refer to it as anything else?

10 A. No. Sorry. The shaking of the head. No, I
11 wouldn't.

12 Q. Okay. So you see there's a -- the number 15
13 in the middle of the page in the black box.

14 Do you see that?

15 A. Yes.

16 Q. What does that indicate to you, if anything?

17 A. That is just a paragraph number.

18 Q. Okay. Is there any information within this
19 platform that would allow us to see when the
20 Hannah Cloke update was made?

21 A. As previously mentioned, if the logs were
22 available, we could see that. But, unfortunately,
23 they're not available.

24 Q. So were the logs accessible in -- generally
25 speaking from, you know, this page?

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1 A. Yes. I don't know if you have the rest of
2 the page here. But if you scroll down, you can
3 usually see the log section.

4 Q. Okay. And there's a button to access
5 additional material generally; right?

6 MS. GATES: Objection as to form.

7 THE WITNESS: Not sure what you mean by
8 additional material.

9 BY MR. BURROUGHS:

10 Q. All right. Okay. Have you ever -- aside
11 from this case, have you ever had the occasion to
12 look for logs relating to an article and found them
13 not to exist anymore?

14 MS. GATES: Objection as to form.

15 THE WITNESS: I can't say I recall a
16 specific occasion that I went to look for logs and
17 they don't exist anymore. As mentioned, I think it's
18 just a limitation of the system that after a certain
19 amount of time, the logs are just no longer
20 accessible.

21 BY MR. BURROUGHS:

22 Q. Okay. Have you looked for logs in the past?

23 A. Yes.

24 Q. And in those -- and in those cases, you've
25 found the logs?

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1 A. Yes. When -- when needed, usually because
2 it's sort of a recent reason to be looking. So the
3 article isn't particularly old.

4 Q. Okay. So is the -- withdraw the question.

5 Are the logs for the McGucken article the
6 only logs that you have looked for in your tenure at
7 Newsweek and been unable to locate?

8 MS. GATES: Objection as to form.

9 THE WITNESS: I can't -- I can't recall a
10 specific example of another article I looked at where
11 the logs weren't available. But on the basis that
12 the logs do expire and there's some other technical
13 reasons why they're not accessible, it's plausible
14 that I looked at an old article and the log wasn't
15 there.

16 BY MR. BURROUGHS:

17 Q. Okay. So is it accurate to say that the
18 McGucken logs are the only logs that you've sought
19 out and been unable to find?

20 MS. GATES: Objection as to form. Misstates
21 testimony.

22 THE WITNESS: No. I don't think that's
23 accurate. As I said, I can't recall a specific
24 instance where I did this, but it's plausible that I
25 have. I've worked here for a while, so...

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1 BY MR. BURROUGHS:

2 Q. Okay. So let me rephrase.

3 It is accurate to say that the McGucken logs
4 are the only specific logs that you can recall ever
5 looking for and being unable to locate on the
6 Newsweek system?

7 MS. GATES: Objection as to form.

8 THE WITNESS: I would say that I can -- this
9 is the only instance I can recall right now where I
10 wanted to look at the old logs for some reason and I
11 couldn't.

12 BY MR. BURROUGHS:

13 Q. And you couldn't locate them; correct?

14 A. They weren't available in the back of our
15 CMS here.

16 Q. Okay. We're going to put another document
17 in front of you that we're going to mark as
18 Exhibit 16. It's Newsweek 16.

19 (Plaintiff's Exhibit 16 was marked
20 for identification by the court
21 reporter and is attached hereto.)

22 BY MR. BURROUGHS:

23 Q. Do you recognize this exhibit, and if so,
24 how?

25 A. Yes. This looks like the -- a dialogue box

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1 that pops up when -- pardon me -- when embedding an
2 image.

3 Q. Okay. And do you know who inserted that
4 URL?

5 A. I don't know specifically, but it's easy to
6 assume it was the author of the article.

7 Q. Okay. And you see that the information
8 identifies Elliot McGucken as the author?

9 A. Yeah. I see that. I guess that's pulled in
10 from Instagram.

11 Q. Okay. So does the Newsweek system
12 automatically copy the company data from Instagram
13 photographs into the Newsweek system?

14 MS. GATES: Objection as to form.

15 THE WITNESS: Well, it -- it's -- it
16 accesses whatever Instagram provides. And it -- and
17 through the embed, you get to see what's on
18 Instagram.

19 BY MR. BURROUGHS:

20 Q. So it's importing into Newsweek's system the
21 provider, the name of the author, and any text that
22 the author has included below the photograph;
23 correct?

24 MS. GATES: Objection as to form.

25 THE WITNESS: It looks like it is displaying

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1 that information here. Yeah, for -- yeah, I guess
2 so. There it is.

3 BY MR. BURROUGHS:

4 Q. And you can also view a copy of McGucken's
5 photograph on this -- on the Newsweek system;
6 correct?

7 MS. GATES: Objection as to form.

8 THE WITNESS: So that's not a copy of the
9 photograph. It's just a -- again, the embedded
10 window that allows you to see what is posted on
11 Instagram.

12 BY MR. BURROUGHS:

13 Q. Can you see the photograph?

14 A. Yes.

15 Q. Is the photograph reproduced visually in
16 Newsweek's system?

17 MS. GATES: Objection as to form.

18 THE WITNESS: It's visible here. But I
19 wouldn't say it's -- you know, there's a copy of it
20 here.

21 BY MR. BURROUGHS:

22 Q. Okay. Is it more accurate to say it's a
23 reproduction?

24 MS. GATES: Objection as to form.

25 THE WITNESS: Reproduction sounds like

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1 another word for copy, so I wouldn't say that.

2 BY MR. BURROUGHS:

3 Q. Okay. How would you describe the image that
4 we're looking at? If it's not a copy or a
5 reproduction, what is it?

6 MS. GATES: Objection --

7 BY MR. BURROUGHS:

8 Q. The actual image that we're looking at, not
9 the text.

10 MS. GATES: Objection as to form. Compound.

11 THE WITNESS: It's -- it's an image from
12 Instagram.

13 BY MR. BURROUGHS:

14 Q. Now, is there any indication here that
15 Mr. McGucken has provided consent for the use, in any
16 way, of this photograph on the Newsweek website?

17 MS. GATES: Objection as to form.

18 THE WITNESS: No consent in, you know, like
19 a very highly descriptive, I, Elliot McGucken, give
20 consent to embed an image from Instagram.

21 BY MR. BURROUGHS:

22 Q. What evidence of consent do you see here?

23 MS. GATES: Objection as to form.

24 THE WITNESS: Well, I don't know that I can
25 answer that. It's merely an embed, so it is simply

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1 publicly available like that.

2 BY MR. BURROUGHS:

3 Q. Okay. Can Newsweek identify any indicia or
4 information in its CMS system that reflects the
5 photographer's consent for Newsweek to display their
6 photograph on their site?

7 MS. GATES: Objection as to form.

8 THE WITNESS: Sorry. Just repeat that,
9 please.

10 BY MR. BURROUGHS:

11 Q. Sure. Is there anything in this system that
12 indicates whether or not the artist consented to
13 Newsweek displaying their photograph?

14 MS. GATES: Same objection.

15 THE WITNESS: So if we've hosted an image on
16 our server, the credits for that is displayed as part
17 of the sort of licensing agreement of hosting that
18 image.

19 BY MR. BURROUGHS:

20 Q. What if it's embedded?

21 A. Whatever is embedded is -- is pulled from
22 Instagram. It's not on our system. So whatever
23 Instagram is displaying.

24 Q. So for embeds, there's no information
25 relating to consent in the system; correct?

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1 MS. GATES: Objection as to form. Misstates
2 testimony.

3 THE WITNESS: From -- you kind of get what
4 you see from Instagram.

5 BY MR. BURROUGHS:

6 Q. Okay. So is there any indicia?

7 MS. GATES: Objection as to form.

8 THE WITNESS: Sorry. I don't understand
9 that word.

10 BY MR. BURROUGHS:

11 Q. Is there anything, any information, any text
12 in your system, to indicate whether or not the artist
13 consented to an embed?

14 MS. GATES: Objection as to form.

15 THE WITNESS: As mentioned, I -- I don't
16 believe we have anywhere in the system saying, I, the
17 artist, consent to this embed.

18 BY MR. BURROUGHS:

19 Q. That's because Newsweek doesn't care whether
20 or not the photographer has consented for use of an
21 embed; correct?

22 MS. GATES: Objection as to form.
23 Speculation. Argumentative.

24 BY MR. BURROUGHS:

25 Q. Go ahead.

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1 A. Sorry. Could you repeat the question?

2 Q. Sure. And there's no indicia or no text in
3 your system to reflect whether or not the
4 photographer has consented to the embed of their work
5 because Newsweek doesn't care one way or the other
6 whether or not they have photographer consent.

7 MS. GATES: Same objection.

8 BY MR. BURROUGHS:

9 Q. Correct?

10 A. So there's -- there's no text here saying,
11 I, the author of this image, consent to embedding.

12 Q. Okay. And there's no text anywhere in the
13 system; correct?

14 MS. GATES: Objection as to form.

15 THE WITNESS: What kind of text?

16 BY MR. BURROUGHS:

17 Q. Reflecting whether or not the artist
18 consented.

19 A. To using an embed?

20 Q. Correct.

21 A. So as stated, we don't have a text somewhere
22 saying, I, the artist, consent to the embed.

23 Q. Okay. And is there a reason why you don't
24 choose to include that?

25 MS. GATES: Objection as to form.

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1 THE WITNESS: So as stated earlier, the
2 embedding is not considered a sort of a copyright
3 issue because it's not hosted on our system. It's
4 hosted externally.

5 BY MR. BURROUGHS:

6 Q. Okay. So because it's not a -- in your
7 estimation, a copyright issue, you don't feel that
8 it's important to indicate whether or not the artist
9 consented to the use of their work; correct?

10 MS. GATES: Objection as to form.

11 THE WITNESS: So by posting their image on a
12 website that allows you to -- or allows people to
13 embed that image, we -- we make use of that.

14 BY MR. BURROUGHS:

15 Q. Any other reason?

16 A. Sorry. Any other reason for?

17 Q. For why there's no indication in your system
18 as to whether or not the artist has consented to your
19 display of their work?

20 MS. GATES: Objection as to form.

21 THE WITNESS: No.

22 BY MR. BURROUGHS:

23 Q. We're going to put another exhibit in front
24 of you. This will be Exhibit 17. I believe we're
25 going to depart from the -- oh, no, this is Newsweek

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1 17 as well.

2 (Plaintiff's Exhibit 17 was marked
3 for identification by the court
4 reporter and is attached hereto.)

5 BY MR. BURROUGHS:

6 Q. Have you ever seen this e-mail before?

7 A. Yes. It looks like it was a part of the
8 documents provided.

9 Q. Okay. And do you see a reference to
10 revenue? "Probably we can calculate it based on the
11 RPM of May 2019."

12 Do you see that?

13 A. Yes.

14 Q. What does that mean to you?

15 A. It means they can probably calculate the
16 revenue.

17 Q. What is an RPM?

18 A. I -- I think it stands for revenue per mille
19 or per thousand.

20 Q. Okay. But that's not something you work
21 with; correct?

22 A. No.

23 Q. You don't know why they would choose May of
24 2019 to calculate it; correct?

25 A. I don't.

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1 Q. Okay. We're going to put one more document
2 in front of you. This will be Exhibit 18, but it's
3 Newsweek 21.

4 (Plaintiff's Exhibit 18 was marked
5 for identification by the court
6 reporter and is attached hereto.)

7 BY MR. BURROUGHS:

8 Q. Have you seen this document before?

9 A. Yes. I believe it's part of the documents
10 provided.

11 Q. Okay. So this isn't a document that you
12 generated; correct?

13 A. No.

14 Q. And this isn't a document that you had any
15 personal experience with; correct?

16 A. What do you mean by personal experience?

17 Q. Were you involved in any way in the drafting
18 of this document, putting together the data for this
19 document? Do you have any involvement whatsoever
20 with it?

21 A. No.

22 MS. GATES: Objection as to form. Compound.

23 BY MR. BURROUGHS:

24 Q. So your involvement with this document is
25 you saw it at some time when your attorney showed it

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1 to you; correct?

2 MS. GATES: Objection as to form. Getting
3 into privileged communications.

4 THE WITNESS: Yes.

5 BY MR. BURROUGHS:

6 Q. Okay. Now you see a calculation there. And
7 just to clarify, you're -- are you aware that you're
8 Newsweek's designated witness to testify in regards
9 to Newsweek's revenues related to this action?

10 A. As to the extent of my knowledge on the
11 subject, yes.

12 Q. Okay. So it indicates in here, as per
13 average RPM of May 2019, it will be around 16.80
14 average times 5,472 PVs equals \$91.92.

15 Do you see that?

16 A. I do.

17 Q. And what does that mean to you?

18 A. Right. It's -- it sounds like the average
19 revenue as of May of 2019 will be -- so that's the
20 average per 1,000 PVs, which is page views.

21 So the average is \$16.80 times the total
22 number of page views that the article had, which
23 equals the 91.92.

24 Q. Do you know why they did an average as
25 opposed to calculating the specific amount of revenue

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1 attributable to the page at issue?

2 MS. GATES: Objection as to form.

3 THE WITNESS: I don't know.

4 BY MR. BURROUGHS:

5 Q. Okay. Do you know why they chose May 2019
6 as opposed to some other month?

7 MS. GATES: Objection as to form.

8 THE WITNESS: I don't know.

9 BY MR. BURROUGHS:

10 Q. Do RPMs change from month to month, to your
11 knowledge?

12 A. I don't know.

13 Q. Is there any data or financial documents
14 that underlie this particular accounting, to your
15 knowledge?

16 A. So I believe the data will be gathered from
17 analytics of the content.

18 Q. What analytics?

19 A. There's likely a Google Analytics report as
20 there is for every article.

21 Q. Have you seen those?

22 A. I haven't seen the analytics report.

23 Q. Okay. So as far as you know, these numbers
24 in this e-mail could have been pulled from thin air;
25 correct?

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1 MS. GATES: Objection as to form.

2 Argumentative.

3 THE WITNESS: I -- I didn't provide these
4 numbers, so I don't know where they came from.

5 BY MR. BURROUGHS:

6 Q. Okay. And you haven't seen any underlying
7 documents or numbers or evidence that would support
8 these numbers; correct?

9 MS. GATES: Objection as to form. Compound.

10 THE WITNESS: I think we have a screenshot
11 of the analytics page, which speaks to this.

12 BY MR. BURROUGHS:

13 Q. Other than that, are there any documents
14 that would support this calculation that you're aware
15 of?

16 A. Not that I'm aware of.

17 Q. Okay. Do you know if this accounting is
18 done per accepted industry standards for calculating
19 revenues for particular pages?

20 MS. GATES: Objection as to form.

21 THE WITNESS: I don't know. It's outside of
22 my department.

23 BY MR. BURROUGHS:

24 Q. Okay. In fact, you yourself have no
25 experience in calculating revenues for the website;

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1 correct?

2 MS. GATES: Objection as to form.

3 THE WITNESS: I don't.

4 BY MR. BURROUGHS:

5 Q. Okay. And you yourself don't have any
6 experience calculating those revenues or have not
7 reviewed any documents relating to those revenues;
8 correct?

9 MS. GATES: Objection as to form.

10 THE WITNESS: Not in general terms. And
11 aside from the one mentioned specifically about this
12 measurement here.

13 BY MR. BURROUGHS:

14 Q. Okay. And have you spoken with anyone about
15 how these numbers were calculated?

16 A. No.

17 Q. Okay. So is it accurate to say that the
18 entirety of your understanding relating to Newsweek's
19 revenues related to the article at issue come from
20 these documents you were given?

21 MS. GATES: Objection as to form.

22 THE WITNESS: Yes.

23 BY MR. BURROUGHS:

24 Q. Okay. Let's scroll down. Stop.

25 Have you seen this e-mail before?

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1 A. I mean, it's not a lot to see here.

2 Q. Who is L. Costa?

3 A. Luciano Costa, one of the sort of technical
4 executives I believe.

5 Q. Is she an attorney?

6 A. Luciano, no, I don't think so. I actually
7 don't know.

8 Q. Okay. Who is Rosie McKimmie?

9 A. I believe Rosie is our legal counsel.

10 Q. Okay. Is she in-house?

11 A. In the sense that we can contact her on
12 legal queries, yes.

13 Q. Okay. Who is Alvaro Palacios?

14 A. I believe another one of the technical team.

15 Q. Okay. Is Alvaro an attorney?

16 A. Not to my knowledge.

17 Q. Okay. How long has Rosie been with
18 Newsweek?

19 A. That I'm not sure of.

20 Q. Okay. Before this dispute, had you ever
21 gone to her with a legal question before?

22 A. Yes. I've dealt with her (audio issue).

23 Q. Okay. What do you recall asking her in the
24 past, what subjects?

25 A. It will often just be to clear any stories

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1 with her that we might have a legal concern about.

2 Q. Okay. Do you recall specifically doing that
3 at any time?

4 A. I recall -- I don't recall specifically the
5 instances, but I have done that.

6 Q. Did you consult with her relating to
7 Ms. Hignett's article?

8 A. I did not.

9 Q. Okay. But theoretically she was available
10 as a resource, so if you wanted to check with her at
11 the time relating to Ms. Hignett's article, you could
12 have; correct?

13 MS. GATES: Objection as to form.

14 THE WITNESS: Theoretically she's available
15 for us to -- you know, for any legal questions we
16 might have.

17 BY MR. BURROUGHS:

18 Q. Okay. Did Ms. McKimmie ever see
19 Ms. Hignett's article in 2019?

20 MS. GATES: Objection as to form. Calls for
21 speculation.

22 THE WITNESS: That I don't know.

23 MR. BURROUGHS: All right. Let's go off the
24 record for five minutes. I think we're almost done,
25 if not done.

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1 (Recess.)

2 MR. BURROUGHS: Let's go back on the record.

3 BY MR. BURROUGHS:

4 Q. We're going to put this -- a document on the
5 screen for your viewing that we're going to mark as
6 Exhibit 19, it's Newsweek 20.

7 (Plaintiff's Exhibit 19 was marked
8 for identification by the court
9 reporter and is attached hereto.)

10 BY MR. BURROUGHS:

11 Q. And I want you to tell me if you recognize
12 this document, and if so, how?

13 A. Yes. This looks like part of the documents
14 provided.

15 Q. Okay. And what is it?

16 A. This looks like the Google Analytics of
17 presumably this article. Yeah. Or I can sort of
18 tell from that URL down there.

19 Q. Okay. Is this a document of the type that
20 you work with regularly at Newsweek?

21 A. Yes. We can look at the analytics of our
22 articles.

23 Q. I understand that you can. Do you regularly
24 do that?

25 A. Can you define "regularly"?

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1 Q. Every day?

2 A. Not every day.

3 Q. Every week?

4 A. Not every week.

5 Q. Every month?

6 A. Not every month on a recurring basis. I
7 might look -- yeah, I might look in here when I have
8 purpose to, such as gathering some information on
9 performance of an article.

10 Q. Is your compensation tied in any way to
11 traffic?

12 A. No. Not directly tied to traffic.

13 Q. Is it tied in any way to traffic?

14 A. In the sense that if Newsweek gets no
15 traffic, we won't have a business.

16 Q. Is it fair to say that traffic is what gives
17 Newsweek its value?

18 MS. GATES: Objection as to form.

19 THE WITNESS: I need the definition of
20 "value" there.

21 BY MR. BURROUGHS:

22 Q. The ability to pay its employees?

23 MS. GATES: Objection as to form.

24 THE WITNESS: I would assume that traffic is
25 one of the ways that we are able to pay our

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1 employees.

2 BY MR. BURROUGHS:

3 Q. What are the other ways?

4 A. I don't know specific details, but I'm sure
5 there are some sort of marketing agreements or other
6 agreements in place that generate revenue. But I
7 don't know what those are.

8 Q. Are you aware of any of those actually
9 existing, or are you speculating?

10 MS. GATES: Objection as to form.

11 THE WITNESS: I would say I'm not aware of
12 anything specific in that regard, but in general
13 I'm -- they -- they exist, but I guess -- I suppose
14 I'm using the word "guess," so I am speculating on
15 what avenues of revenue generation, those sorts of
16 things bring.

17 BY MR. BURROUGHS:

18 Q. Okay. Who -- is your writers' compensation
19 tied in any way to traffic?

20 A. Our writers would receive a bonus payment
21 based on the amount of traffic they receive.

22 Q. What's the threshold for the lowest bonus
23 payment, in terms of traffic?

24 A. I can't recall off the top of my head.

25 Q. So is it fair to say that Newsweek

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1 incentivizes its writers to publish articles that
2 will attract a lot of traffic?

3 MS. GATES: Objection as to form.

4 THE WITNESS: That -- that's partially true,
5 but they will get paid even if they don't generate a
6 lot of traffic.

7 BY MR. BURROUGHS:

8 Q. Will they get paid the bonuses?

9 MS. GATES: Objection as to form.

10 THE WITNESS: They -- sorry. Can I go?

11 BY MR. BURROUGHS:

12 Q. Sure.

13 A. They -- they -- there's sort of different
14 thresholds of bonuses. If they don't meet the
15 threshold, they don't get the bonus.

16 MS. GATES: Are we frozen?

17 THE WITNESS: I think Scott's frozen.

18 BY MR. BURROUGHS:

19 Q. (Audio issue.)

20 THE REPORTER: Could you repeat that
21 question because --

22 MS. GATES: Sorry. Can you repeat --

23 MR. BURROUGHS: All right. Am I unfrozen?

24 MS. GATES: You're unfrozen now.

25 MR. BURROUGHS: Am I unfrozen?

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1 MS. GATES: Yes.

2 THE WITNESS: Yes, I can hear you.

3 BY MR. BURROUGHS:

4 Q. Okay. In your experience at Newsweek, do
5 Newsweek articles with photographs attract more
6 traffic than articles without photographs?

7 MS. GATES: Objection as to form.

8 THE WITNESS: I couldn't say either way.

9 BY MR. BURROUGHS:

10 Q. Okay. So as far as you know, traffic is
11 generally the same for articles with photographs and
12 without; correct?

13 MS. GATES: Objection as to form.

14 THE WITNESS: I couldn't say. I think it
15 would be a case-by-case basis.

16 BY MR. BURROUGHS:

17 Q. Okay. Do you have any guidelines whereby a
18 photograph has to be included with an article before
19 it's published?

20 MS. GATES: Objection as to form.

21 THE WITNESS: Yes. In the sense that every
22 article has an accompanying image, we will upload one
23 into our system.

24 BY MR. BURROUGHS:

25 Q. Are you aware of any Newsweek articles

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1 during your tenure that didn't include a visual?

2 A. I can't say of a specific article, but it's
3 plausible that could have happened.

4 Q. Okay. But it's fair to say that the vast
5 majority of Newsweek articles include visuals;
6 correct?

7 A. All of the articles that I work on will
8 typically include a visual.

9 Q. Okay. That's because it's understood in the
10 industry that articles with photographs perform
11 better in terms of traffic; correct?

12 MS. GATES: Objection as to form.
13 Speculation.

14 THE WITNESS: The -- the sort of most basic
15 requirements to the image is so that there is an
16 image display on a platform such as Google News and
17 Facebook and so on when that article is sort of
18 shared up via those ways. So that's sort of the
19 basic driving reason for having an image in it.

20 BY MR. BURROUGHS:

21 Q. Okay. Have you ever approved an article for
22 publication that didn't include a visual?

23 A. I have not.

24 Q. So looking at the exhibit in front of you,
25 is this for the entire period of time during which

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1 the disputed article was online?

2 A. This -- if you look at the top right there,
3 this is for the period of, as you can see, 1 March
4 2018 to October 31, 2019.

5 Q. Okay. Did you choose this period?

6 A. I did not.

7 Q. Was the disputed article online in November
8 of 2019, to your knowledge?

9 A. To -- I don't know.

10 Q. And what does this reflect in terms of page
11 views for this time period?

12 A. If we could just scroll down to the bottom
13 just so I can see the rest, please. Yeah. Okay.
14 And sorry, if you don't mind going back up again.

15 So that -- that appears to tell me that
16 during this period of 1 March 2018 up to the October
17 31, 2019, it generated 5,427 page views.

18 Q. Okay. And does this indicate to you where
19 those viewers came from?

20 A. Only in the broadest sense. So if we scroll
21 down a little bit.

22 For example, you can see that URL string
23 there on No. 3 mentions Twitter. You know, that
24 tells me that they came via Twitter. And so on. But
25 no details really.

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1 Q. Did Newsweek distribute a link to this
2 article on Twitter?

3 A. I don't know for certain. But I think it's
4 safe to say it probably was tweeted on our account at
5 some point.

6 Q. And is that based at least in part on the
7 records in front of you?

8 A. No. Because it is possible that these --
9 that that traffic came from another Twitter user. So
10 I can't be sure if that was from our person or from
11 someone else.

12 Q. Okay. Is it Newsweek's general practice,
13 and was it Newsweek's general practice in 2019, to
14 tweet out links to each of its articles?

15 A. Yes. In general, a tweet would go out for
16 each article, although the social media editor may
17 have chosen not to for some reason.

18 Q. And when Newsweek would tweet out an
19 article, they would include the visual with the
20 tweet; correct?

21 MS. GATES: Objection as to form.

22 THE WITNESS: The visual will typically be
23 the image we have uploaded to our system.

24 BY MR. BURROUGHS:

25 Q. Can you tell me whether or not, in this

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1 case, Newsweek ever tweeted out a tweet incorporating
2 the McGucken image?

3 MS. GATES: Objection as to form.

4 THE WITNESS: I -- not to my knowledge. I
5 don't know.

6 BY MR. BURROUGHS:

7 Q. Okay. So you're unaware one way or the
8 other; correct?

9 MS. GATES: Objection as to form.

10 THE WITNESS: I -- I don't know if we
11 tweeted out this article with the McGucken image
12 somehow attached to that.

13 BY MR. BURROUGHS:

14 Q. Okay. Would there be a record of that if
15 you did?

16 A. Presumably you could just look at our
17 Twitter feed or our social feeds and then see for
18 yourself.

19 Q. Okay. And you haven't done that; correct?

20 A. I have not done that.

21 Q. Okay. Was it also Newsweek's practice to
22 post on Facebook relating to new articles?

23 A. Yes. Generally speaking, articles will be
24 posted to Facebook, but as with Twitter, there may
25 have been an editor who decided not to for some

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1 reason, so I can't say specifically.

2 Q. Okay. And you don't know one way or the
3 other whether or not Newsweek published McGucken's
4 photograph on Facebook as well; correct?

5 MS. GATES: Objection as to form.

6 THE WITNESS: I don't know.

7 MR. BURROUGHS: Okay. I have no further
8 questions. Ms. Gates, if you want to question your
9 witness, go ahead.

10 MS. GATES: If we could just take a few
11 minutes off record.

12 (Recess.)

13

14 EXAMINATION

15 BY MS. GATES:

16 Q. So if we could -- I just have a few
17 questions here. If we could just take a quick look
18 at that last exhibit, I believe I can actually pull
19 it up here on my screen. So this is Exhibit 19,
20 Newsweek 20.

21 So let's take a look at some of these
22 numbers here. Can you just read off the page views
23 and the unique page views for me?

24 A. Sure. So the total for that period, March
25 1, 2018, to October 31, 2019, total page views,

1 5,427, and total unique page views 5,099.

2 Q. And what is a page view?

3 A. Page view is just a user viewing the page --
4 the article.

5 Q. And what is a unique page view?

6 A. A unique page view will generate -- sorry.
7 Just trying to think how to phrase it.

8 It's not quite the same as a page view
9 because this is the unique viewers of that page. So
10 for example, here there were 400-odd people who may
11 have refreshed the page and viewed it twice as such.
12 So there were 5,099 uniquely identified viewers of
13 this page, according to these analytics.

14 Q. So is it correct that the page view count
15 could capture duplicate views from the same viewer?

16 A. It's technically possible, yes.

17 Q. And as far as the total page views on this
18 article, is -- would you say that this is a highly
19 viewed article?

20 A. I would not.

21 Q. How would you characterize it, in your
22 estimation, by the number of page views?

23 A. So you know, for 5,000 page views, that
24 article is -- it's debatable if it was worth the
25 effort to produce it.

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1 Q. What is typical of articles? What -- what
2 would you expect to see in page views?

3 A. So what I would like to see is, you know,
4 10,000 on the day it's published as sort of a minimum
5 just as a real -- what is the word I'm looking for
6 here? As just kind of a benchmark for whether it's a
7 good -- it was worth producing that article, whether
8 we even had a good idea and it succeeded.

9 Q. And how many page views would you expect to
10 get from a highly popular article?

11 A. So once we start getting to like 30,000 and
12 above, that's kind of a -- you know, what I'd
13 categorize as a successful news article. And once
14 you start hitting the hundreds of thousands, it's
15 very successful.

16 Q. All right. Thank you.

17 MS. GATES: That's all the questions we have
18 at this time subject to --

19 MR. BURROUGHS: Just one question following
20 up on that.

21

22 FURTHER EXAMINATION

23 BY MR. BURROUGHS:

24 Q. As editor of Newsweek, do you believe that
25 the article would have had more traffic if the

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1 Newsweek reporter had done more original reporting
2 instead of primarily respond -- or relying on
3 material that was already online elsewhere?

4 MS. GATES: Objection as to form.
5 Speculation.

6 THE WITNESS: I can't say one way or the
7 other how it would have performed if we did things
8 differently.

9 BY MR. BURROUGHS:

10 Q. Okay. In your opinion, does the amount of
11 original Newsweek reportage in a piece affect the
12 traffic numbers?

13 MS. GATES: Objection as to form.

14 THE WITNESS: Not necessarily. It really
15 depends on the subject.

16 MR. BURROUGHS: Nothing further.

17 MS. GATES: And nothing further at this
18 time.

19 MR. BURROUGHS: So we can now relieve the
20 court reporter of her duties.

21 And before we go off-line, we'll agree that
22 a certified copy will be sent to Ms. Gates, and
23 Mr. Etherington-Smith will have 30 days from Ms.
24 Gates' receipt of the transcript to make any
25 revisions. If he doesn't make any revisions in that

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1 time, the transcript will stand as constituted when
2 sent. And I believe that's all.

3 Is that agreeable?

4 MS. GATES: That is agreeable.

5 And we also agree to temporarily designate
6 this transcript as confidential subject to our review
7 and designation of specific portions during that
8 30-day period contemplated by the protective order.

9 MR. BURROUGHS: Okay. That's -- I don't
10 have the protective order in front me, but we'll
11 absolutely comply with the protective order.

12 MS. GATES: Great.

13 MR. BURROUGHS: All right. Thanks,
14 everyone.

15 THE REPORTER: Ms. Gates, would you like a
16 copy?

17 MS. GATES: Yes, please.

18 (Whereupon the deposition was
19 concluded at 10:11 a.m.)
20
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25

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STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, JAMES ETHERINGTON-SMITH, having appeared
for my deposition on Thursday, March 11, 2021, do
this date declare under penalty of perjury that I
have read the foregoing deposition, I have made any
corrections, additions or deletions that I was
desirous of making in order to render the within
transcript true and correct.

IN WITNESS WHEREOF, I have hereunto
subscribed my name this _____ day of _____,
2021.

JAMES ETHERINGTON-SMITH

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1 STATE OF CALIFORNIA)
2) ss.
3 COUNTY OF LOS ANGELES)

4 I, MARYLYNNE SANDOVAL-ROBLES, CSR No. 12498,
5 a court reporter for the County of Los Angeles, State
6 of California, do hereby certify;

7 That prior to being examined, JAMES
8 ETHERINGTON-SMITH, the witness named in the foregoing
9 deposition, was by me duly sworn to testify the
10 truth, the whole truth, and nothing but the truth;

11 That said deposition was taken before me at
12 the time and place herein set forth, and was taken by
13 me in shorthand and thereafter transcribed into
14 typewriting under my direction and supervision, and I
15 hereby certify that the said deposition is a full,
16 true and correct transcript of my shorthand notes so
17 taken;

18 I further certify that I am neither counsel
19 for nor related to any party to said action, nor in
20 any way interested in the outcome thereof.

21 IN WITNESS WHEREOF, I hereto subscribe my
22 name this 23rd day of March, 2021.

23 
24

25 Certified Shorthand Reporter in
and for the County of Los Angeles,

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Index: \$16.80..addressed

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